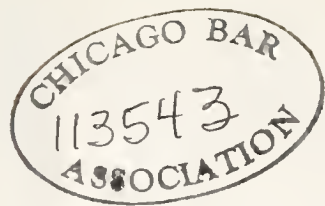





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PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	COURT OF COOK COUNTY.
)	
vs.)	
)	
ALONZO BAKER,	)	HON. EARL E. STRAYHORN,
	)	Presiding.
Defendant-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P. J., Goldberg and Egan, J. J.

Alonzo Baker, defendant, was convicted upon his negotiated plea of guilty of attempt robbery and attempt armed robbery (Ill. Rev. Stat. 1973, ch. 38, pars. 8-4, 18-1 and 18-2), as charged in two separate indictments. Defendant was also found guilty after a bench trial of the crime of armed robbery as charged in a third indictment. He was sentenced to concurrent terms of two to six years for attempt robbery, two to six years for attempt armed robbery and four to eight years for armed robbery.

Defendant wished to appeal and the office of the State Appellate Defender was appointed to represent him. After examining the record, the State Appellate Defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to requirements set out in Anders v. California, 386 U. S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are: (1) that in accepting defendant's pleas of guilty the trial court failed to comply with Supreme Court Rule 402; (2) that at defendant's bench trial the evidence was insufficient to establish his guilt beyond a reasonable doubt; and (3) that defendant's sentences are excessive. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Copies of the motion and brief were mailed



to the defendant on February 13, 1975. He was informed that he had until April 1, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

The first possible argument which could be raised on appeal is that the trial court, in accepting defendant's plea of guilty, failed to comply with Supreme Court Rule 402. (Ill. Rev. Stat. 1973, ch. 110A, par. 402.) The record reflects that when defendant's case was called, defendant appeared represented by privately retained counsel. After a pretrial conference with the court, defense counsel in defendant's presence informed the trial judge that defendant wished to enter a plea of guilty. The trial judge informed defendant of the crime charged in each of the indictments by name. Defendant was advised of the possible statutory penalties for each of the crimes charged and of the fact that the sentences could be made to run consecutively. Defendant stated that he understood that by the entering of a plea of guilty, he waived his right to a trial by jury, his right to a bench trial and his right to confront the witnesses against him. The trial judge by questioning defendant ascertained that he understood there had been a pretrial conference with the court and understood the sentences which would be imposed upon a plea of guilty. Thereafter, the facts which provided the basis for each of the indictments were stipulated to by the parties. Defendant's pleas of guilty were then accepted by the trial court.

Defense counsel in his brief states that it could be argued that the trial judge did not inform the defendant of the nature of the charge. The record affirmatively reflects that in accepting his plea of guilty, the trial judge advised the defendant of the crime charged in each of the indictments by name. Thereafter, the facts which provided the basis for each of the indictments were stipulated to by the parties. In that stipulation the crime charged in each indictment was again stated. These statements



were sufficient to apprise defendant as to the nature of the crime charged. People v. Krantz, 58 Ill. 2d 187, 317 N.E. 2d 559; People v. Tennyson, 9 Ill. App. 3d 329, 292 N.E. 2d 223.

It could also be argued that the trial court did not inform the defendant that he had a right to persist in his plea of not guilty and did not inquire of the defendant whether threats or promises had been used to induce his plea of guilty. Supreme Court Rule 402 requires only substantial compliance with its terms. (People v. Mendoza; 48 Ill. 2d 371, 270 N.E. 2d 30.) Here, defendant represented by privately retained counsel entered a negotiated plea of guilty only after a pretrial conference with the court knowing the exact sentence which he would receive. Defendant was admonished as to the crime charged in each of the indictments and the possible statutory penalties including the fact that the sentences could be made to run consecutively. Defendant stated that he understood that by entering a plea of guilty he waived his right to a jury trial or a bench trial and the right to confront the witnesses against him. After a complete review of the entire record, we conclude that defendant was fully aware of each of his options and that his plea of guilty was voluntarily entered.

The second possible argument which could be raised on appeal is that the evidence adduced at defendant's bench trial was insufficient to establish his guilt beyond a reasonable doubt on the charge of armed robbery. In a bench trial the credibility of witnesses and the weight to be given to their testimony are matters for the trial court to determine. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. (People v. Clark, 52 Ill. 2d 374, 288 N.E. 2d 363.) The testimony of one witness if positive and credible is sufficient to sustain a conviction even though contradicted by the

defendant. People v. Griffin, 12 Ill. App. 3d 193, 297 N.E. 2d 770.

In the case at bar, the State produced the testimony of Geraldine Allen which was positive and credible. She stated that while working for Kapehart Cleaners the defendant entered the store, produced a gun and announced a holdup. During the robbery which took approximately 20 minutes, she was able to get a clear look at the defendant. One week later she went to investigate a disturbance two doors down from the cleaning store and identified the defendant who had been placed under arrest by Chicago Police Officer Dudeck. At the time he was placed under arrest the defendant had in his possession a gun similar to that used in the robbery. This evidence was sufficient to establish defendant's guilt beyond a reasonable doubt even though defendant testified to the contrary.

The third possible argument which could be raised on appeal is that defendant's sentences were excessive and should be reduced. While this court has the power to reduce sentences (Ill. Rev. Stat. 1973, ch. 110A, par. 615(b)), that power should be exercised with care and only where it is manifest in the record that the sentence is excessive. (People v. Fox, 48 Ill. 2d 239, 269 N.E. 2d 720.) The trial judge who heard the testimony in matters presented in aggravation and mitigation is ordinarily in a better position in a reviewing court to determine the punishment to be imposed. People v. Winfield, 133 Ill. App. 2d 48, 272 N.E. 2d 848.

In the case at bar, the trial judge at the time of sentencing, had a presentence investigation report and a psychiatric report upon the defendant. After considering the facts of the case and the presentence and psychiatric reports, the trial judge sentenced the defendant to concurrent sentences of two to six years on the charges of attempt robbery and attempt armed robbery and four to

eight years on the charge of armed robbery. After a complete review of the record, we cannot say that the trial judge's sentence was improper.

We have examined the record and concur in the opinion of the State Appellate Defender that none of the arguments thus raised has substantial merit. Our inspection of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the State Appellate Defender is granted leave to withdraw as counsel on appeal and the judgments of the circuit court of Cook County are affirmed.

JUDGMENTS AFFIRMED.

(Abstract Only)

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60542)
60543)

PEOPLE OF THE STATE OF ILLINOIS,)	
)	APPEAL FROM THE
Plaintiff-Appellant,)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
HOWARD JACKSON,	)	JAMES A. CONDON,
	)	PRESIDING.
Defendant-Appellee.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION).

Before BURKE, P.J., GOLDBERG, J. and EGAN, J.

The State, pursuant to Supreme Court Rule 604(a)(1) (Ill. Rev.Stat. 1973, ch. 110A, §604(a)(1)), appeals from an order of the circuit court of Cook County suppressing the evidence.

At the hearing on defendant's motion to suppress, Chicago Police Officer Clayton testified that on April 15, 1974, he observed the defendant, Howard Jackson, slumped over the steering wheel of his parked car. Officer Clayton and his partner exited their vehicle to investigate. As Officer Clayton approached defendant's car, he observed the defendant apparently asleep and slumped over the steering wheel of his car. Defendant was holding a gun in his hand. The officers called for assistance. After other police arrived, they opened the car door and seized the gun in defendant's hand. Defendant was then charged with unlawful use of weapons (Ill.Rev.Stat. 1973, ch. 38, §24-1(a)(10)) and failure to possess an Illinois Firearm Owner's Identification Card (Ill.Rev. Stat. 1973, ch. 38, §83-2). Defendant's motion to suppress was sustained by the trial court and the State appeals.

The State's only argument on appeal is that the trial court erred in granting defendant's motion to suppress the evidence. Defendant argues that the police lacked probable cause to place him under arrest. The rule is well established that a police officer may arrest a person without a warrant when he has reasonable grounds to believe the person is committing or has committed an offense (Ill.Rev.Stat. 1973, ch. 38, §107-2(c)). Probable cause

exists when a reasonable and prudent man in possession of the knowledge which has come to the arresting officer's attention would believe the person to be arrested is guilty of the crime. People v. Harper, 16 Ill.App.3d 252, 305 N.E.2d 680.

The Criminal Code provides that no person shall carry or possess in a vehicle or on or about his person within the corporate limits of a city, village or incorporated town, except when on his land or in his own abode or fixed place of business, any loaded pistol, revolver or other firearm (Ill.Rev.Stat. 1973, ch. 38, §24-1(a)(10)). The Criminal Code also provides that no person may acquire or possess a firearm or firearm ammunition in this State without having in his possession a Firearm Owner's Identification Card. Ill.Rev.Stat. 1973, ch. 38, §83-2.

In People v. Haves, 55 Ill.2d 78, 302 N.E.2d 37, the defendant was originally charged with unlawful use of weapons and unlawful possession of heroin. After a bench trial, defendant was found guilty of unlawful possession of heroin. The evidence adduced at trial demonstrated that the police officers observed defendant slumped over the steering wheel of his automobile, which was parked in a "no parking" zone. As the officers approached the car, they observed a .38 caliber revolver on the front seat beside defendant. The officers opened the door and seized the revolver. Defendant was placed under arrest and a subsequent search of defendant's person revealed the heroin. On appeal, defendant argued that the police officers lacked probable cause to place him under arrest. The court rejected this contention, holding: "The conduct of the officers in arresting the defendant and conducting a search of his person was justified under the circumstances of this case."

In the case at bar, the police officers observed defendant slumped over the steering wheel of his car, which was parked on a city street. The police officers' conduct in approaching the

defendant's automobile for further investigation was proper. When the officers observed defendant apparently sleeping in his vehicle with a gun in his hand, they were fully justified in entering the automobile and seizing the gun for the purpose of securing evidence of an apparent offense. Here, the total picture which confronted the officers, the unusual conduct of defendant and the presence of a gun in his hand in a parked car were sufficient to provide probable cause for his arrest. See People v. Zazzetti, 6 Ill.App.3d 858, 286 N.E.2d 745.

Accordingly, the judgment of the circuit court of Cook County is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED,
WITH DIRECTIONS.

ABSTRACT ONLY.

No. 60715

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Plaintiff-Appellee,)	
	)	COURT OF COOK COUNTY.
v.)	
	)	HONORABLE
EDWARD KUBA, JR.,	)	JEPOME BURKE,
	)	PRESIDING.
Defendant-Appellant.)	

Before DEMPSEY, McNAMARA, and MEJDA, JJ.

PER CURIAM:

Edward Kuba, Jr., defendant, was found guilty after a bench trial of the crime of battery (Ill.Rev.Stat. 1973, ch.38, par.12-3). He was sentenced to a term of 30 days in Cook County Jail. Defendant appeals arguing: (1) that the evidence was insufficient to establish his guilt beyond a reasonable doubt; (2) that the trial court improperly limited his cross-examination of the complainant; (3) that the cross-examination of the defendant was improper; (4) that the trial court improperly excluded evidence of defendant's desire to file a cross complaint, and (5) that the prosecutor's closing argument was improper.

At trial the following evidence was adduced: Nicholas Gordon Cantrell testified that on the evening of September 22, 1973, and the early morning hours of September 23, 1973, he was on a date with Miss Claudette Dodd. At approximately 4:00 a.m., they were in his car in the parking lot of the Paco Paco Restaurant. Miss Dodd's car was also parked in the lot. He was kissing Miss Dodd goodnight when his car door suddenly opened. At that time Miss Dodd fled the scene. Cantrell testified that he was then struck in the face and head by the defendant four or five times. Defendant then left the scene. Cantrell suffered a broken nose as a result of the beating. Cantrell testified that after the incident he was bleeding heavily and began wandering down the street. He turned and went back to see if he could find Miss Dodd. Cantrell stated that when he could not find Miss Dodd he re-entered his car and left the scene.

Edward Kuba, Jr., defendant, testified that on September 23, 1973, at approximately 4:00 a.m., he observed Claudette Dodd's car parked in the Pace Paco parking lot. Two years previously, Miss Dodd had been his girlfriend. Defendant stated that he observed Miss Dodd seated with Cantrell in another car parked next to her car. Defendant opened the driver's door to the second vehicle and asked Miss Dodd what she was doing. At that time Cantrell got out of the vehicle and attempted to kick the defendant in the groin area. Cantrell missed and struck defendant's leg. Defendant stated that he then hit Cantrell in the face several times.

Glenn Gargano, a Cook County Sheriff's police investigator, was called by the defense and testified that he was assigned the investigation of the incident in question. He proceeded to defendant's home to inform him that there was a warrant out for his arrest. Investigator Gargano testified that after several weeks of phone calls the defendant voluntarily surrendered.

Defendant's first contention is that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the State failed to call Miss Dodd who was present at the time of the occurrence as a witness. The rule is well established in this State that the State is not obliged to produce every witness to a crime and the failure to do so does not raise the presumption that the testimony would have been unfavorable to the prosecution. (People v. Carruthers (1974), 18 Ill.App.3d 255, 309 N.E.2d 659; People v. DeSavieu (1973), 11 Ill.App.3d 529, 297 N.E.2d 336.) Here the State produced the testimony of Nicholas Cantrell. His testimony was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant's second contention is that the trial court erred in restricting his cross-examination of the complainant. During cross-examination defense counsel asked the complainant if he

ever had any conversations with the defendant after he saw the defendant at the police station. Complainant replied that he did not. Subsequently, defense counsel asked whether the complainant had ever talked to the defendant in court and whether he had any conversation with the defendant considering his medical bills. Objections by the State to both questions were sustained by the trial court. Defendant now argues that he should have been permitted to inquire into these areas to establish that the complainant was pressing charges only because the defendant refused to pay his medical bills.

The trial court has discretion to restrict the scope of cross-examination. (People v. Anderson (1971), 48 Ill.2d 488, 272 N.E.2d 18.) Considerable latitude is always allowed in cross-examination of a witness, but the scope of such examination must lie within the sound discretion of the trial court. (People v. Gambony (1948), 402 Ill. 74, 83 N.E.2d 321.) It is only where there has been an abuse of discretion resulting in manifest prejudice to a defendant that a reviewing court will interfere. People v. Matthews (1972), 7 Ill.App.3d 1059, 289 N.E.2d 98.

In the case at bar, after a careful review of the record, we find that the cross-examination of the complainant was quite lengthy and thorough. Defense counsel had already elicited a statement from the complainant that after seeing the defendant at the police station he did not have any further conversations with the defendant. Under the circumstances of this case, the trial court's action in sustaining objections to the subsequent questions asked of the complainant did not prejudice the defendant.

Defendant next contends that his cross-examination by the assistant State's attorney was improper. This contention arises out of questions asked by the prosecutor inferring that defendant struck Cantrell several times before Cantrell got out of his car. On each occasion, the defendant denied the accusations. In support of his position defendant cites People v. Nuccio (1969),

43 Ill.2d 375, 253 N.E.2d 353, where the opinion set out at length some nine pages of insinuations none of which were supported by rebuttal testimony. The Nuccio case is readily distinguishable from the case at bar. Here, there were only a few questions asked by the prosecutor regarding who struck the first blow. The basis for the prosecutor's questions was found in the previous testimony of Cantrell that the defendant struck the first blows. The defendant was in no way prejudiced by the prosecutor's cross-examination. People v. Roberts (1971), 133 Ill.App.2d 234, 272 N.E.2d 768.

Defendant's next contention is that the trial court improperly excluded evidence of his desire to file a cross complaint against the complainant. Upon examination of Officer Gargano, defense counsel attempted to elicit the fact that when arrested defendant stated that he wished to file a cross complaint. The State's objection to the question was sustained by the trial court.

In the case at bar, the complainant and the defendant had testified to contradictory versions of what had occurred on the evening in question. This clearly presented a matter of credibility which was for the trier of fact to determine. (People v. Clark (1972), 52 Ill.2d 374, 288 N.E.2d 363.) Officer Gargano's testimony that when arrested the defendant stated a desire to file a cross complaint would have clearly been hearsay and was properly excluded. (People v. Shields (1973), 9 Ill.App.3d 682, 295 N.E.2d 153.) In addition, the question of whether the defendant at the time of his arrest stated his desire to file a cross complaint or did not state his desire to file a cross complaint is irrelevant to defendant's guilt or innocence for the crime charged.

Defendant's final contention is that the prosecutor's closing argument was improper. Defense counsel, during his closing argument, commented upon the fact that the State did not call Miss Dodd as a witness. In rebuttal, the assistant State's attorney responded that after reviewing the police statements of Miss Dodd, it was his judgment that she could not add to the testimony at trial and he

was not calling her as a matter of trial strategy. Defendant now complains that this constituted the personal opinion of the prosecutor based upon matters outside the record. First, we note that no objection was made to this argument by defendant's counsel at trial so the alleged error, if any, was waived.

People v. Harris (1974), 20 Ill.App.3d 773, 314 N.E.2d 500;

People v. Donald (1963), 29 Ill. 2d 283, 194 N.E.2d 227.

Even if we were to consider defendant's contention on its merits and accept his argument that the prosecutor's closing argument was improper, the defendant still is not entitled to relief. The rule is well established that in a bench trial the trial judge is presumed to recognize and disregard all improper evidence. (People v. Grodkiewicz (1959), 16 Ill.2d 192, 157 N.E.2d 16.) This rule applies to arguments and remarks of counsel unless it affirmatively appears that the court was misled or improperly influenced by such remark. (People v. Miller (1971), 2 Ill.App.3d 206, 276 N.E.2d 395.) Here, there is nothing in the record to indicate that the trial court was misled or improperly influenced by the remark of the assistant State's attorney. The evidence of defendant's guilt was clear and convincing.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.



60148

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
vs.)	
	)	HON. JOHN F. HECHINGER,
EDDIE L. POINTER,	)	Presiding
)	
Defendant-Appellant.)	

PER CURIAM (FIRST DISTRICT, FIRST DIVISION):

Before Burke, P.J., Goldberg and Egan, JJ.

Eddie L. Pointer, defendant, was found guilty after a bench trial of the crime of robbery. (Ill. Rev. Stat. 1973, ch. 38, par. 18-1.) He was sentenced to a term of six to eighteen years. Defendant appeals arguing that the evidence was insufficient to establish his guilt beyond a reasonable doubt.

At trial, Walter Johnson testified that on November 17, 1972, at approximately 2:00 P.M., he was in his first floor apartment at 3307 South Calumet Avenue in Chicago when the doorbell rang. Johnson opened the door to his apartment and observed a man whom he did not know in the lobby of the building. Johnson testified that as he stepped out of his apartment, a second man came up behind him and grabbed him by the neck. The man was wearing a ski mask on the top one-half of his face and Johnson could observe his face only from the nose down. The man placed a cloth over Johnson's eyes and dragged him back into the apartment. The men tied Johnson's hands and feet and placed him in the bathtub. The men took two television sets, a watch, \$700, and Johnson's car keys from the apartment. After the robbery Johnson observed that his 1971 Chevrolet bearing Illinois license plate AF 3191 was missing. Johnson identified the man who grabbed him outside of his apartment as the defendant whom he has seen in the building on several prior occasions.

Chicago Police Officer Lawrence Duhig testified that on November 18, 1972, at 4:30 P.M., he and his partner, Officer Lanning,

were on duty in a marked police vehicle when they observed Johnson's car in the parking lot of the Michigan Inn Motel at 3536 South Michigan. The car was locked and there were shell casings of two television sets on the rear seat of the vehicle. Officer Duhig testified that pursuant to orders from the watch commander, he and his partner conducted a stake-out of the vehicle. At approximately 8:30 P.M. the defendant approached the vehicle, entered it using a key, and drove out of the parking lot. Officer Duhig and his partner followed the defendant and attempted to stop him by using their Mars light and the spotlight. The defendant attempted to escape and a chase ensued at speeds of up to 80 m.p.h. At the intersection of 37th and Michigan, defendant crashed his vehicle into another car. Defendant got out of his car and began to run. Officer Duhig testified that after firing one shot, the defendant stopped and was placed under arrest. A search of the defendant revealed a revolver. Inside of the vehicle were a set of car keys which were subsequently identified as belonging to Mr. Johnson.

Joseph Orzech, a Chicago police officer, was called by the defense and testified that on November 17, 1972, he and his partner responded to a call and proceeded to 3307 South Calumet. There he had a conversation with Walter Johnson. Officer Orzech described Johnson as being in a highly emotional state. Johnson described the two men who had robbed him as male Negroes. He was unable to give any further description and did not inform the officers that one of the men wore a mask or that he knew either of the offenders.

Lennett Pointer, the defendant's sister, testified that on November 14, 1972, she gave birth to a child in Mercy Hospital. On November 17, 1972, at 12:00 noon, the defendant and his wife picked her up at the hospital and took her home. Defendant and his wife stayed in her apartment until 2:00 P.M.

Diane Pointer, the defendant's wife, testified that on November 17, 1972, she and her husband lived at 3616 South State and that they picked up Lennett Pointer at Mercy Hospital and took her home. They remained at Miss Pointer's home until 2:00 P.M.

Eddie Pointer, defendant, testified that on November 18, 1972, he walked from his home to the New Michigan Inn Motel to rent a room for a card party. There were approximately ten men in the room playing cards. During the evening defendant testified that he went out to buy some liquor. Prior to leaving a man he knew as Bobbie Walker gave him money to buy the liquor. Walker also gave him a set of car keys and the type and location of the car. Defendant testified that he got into Walker's car, drove out of the parking lot and observed a police vehicle with its Mars lights on behind him. Defendant stated that he turned around to get a better look at the car and at that time he struck another vehicle at the intersection. Defendant denied that he ever sped up to evade the police. Defendant stated that after the crash he attempted to flee because he was on parole and did not have a driver's license. Defendant denied that he had a weapon on his person when he was arrested. Defendant stated that he did not know Bobbie Walker's address or telephone number, although he had known him for the past five years. Defendant admitted that he had in the past been convicted of robbery on two occasions.

Defendant's only contention on appeal is that he was not proven guilty beyond a reasonable doubt because the identification testimony standing alone was insufficient to establish his guilt and that the circumstantial evidence was insufficient in that it did not exclude every reasonable hypothesis of innocence. Where the evidence in a case is circumstantial, the trier of fact is not required to search out a series of potential explanations compatible with innocence and elevate them to the status of reasonable doubt (People v. Russell, 17 Ill. 2d 328, 161 N.E.2d 309; People v. Woods, 19 Ill. App. 3d 753, 312 N.E.2d 822) and the trier of fact

does not have to disregard inferences that flow normally from the evidence. People v. Brown, 27 Ill. 2d 23, 187 N.E.2d 728.

In the case at bar, Walter Johnson testified that he recognized the defendant as the man who robbed him based upon the fact that the lower half of the attacker's face was not covered by a mask. Further he stated that he had seen the defendant in the building a number of times, although he did not notify the police of this fact. While this testimony, standing alone, may have been insufficient to establish defendant's guilt, when considered with all the other evidence, defendant's guilt was established beyond a reasonable doubt.

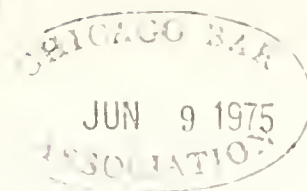
Chicago Police Officer Duhig testified the day after the robbery he conducted a stake-out of the complainant's vehicle which was taken in the robbery and found to be in the parking lot of a motel on South Michigan Avenue. At approximately 8:30 P.M., the defendant approached the vehicle, unlocked the door using keys taken from the complainant in the robbery and entered the vehicle. When defendant realized he was being followed by a police vehicle, he attempted to flee and a high speed chase of 80 miles per hour ensued. Defendant stopped the car only after he crashed into another vehicle. Thereafter defendant attempted to flee on foot and stopped only after the officers fired a shot at him. After a careful review of the entire record, we conclude that when all the evidence introduced by the State is considered as a whole, it was sufficient to establish defendant's guilt beyond a reasonable doubt.

Defendant argues that the trial court did not give sufficient weight to his alibi defense and that this testimony raised a reasonable doubt as to his guilt. The Supreme Court has recently answered this argument holding that there is no obligation upon the trial court to believe a defendant's alibi testimony over the

State's evidence even though the testimony about the alibi may be given by a greater number of witnesses. People v. Jackson, 54 Ill. 2d 143, 295 N.E.2d 462.

Therefore, the judgment is affirmed.

JUDGMENT AFFIRMED



60881, 60882 CONS.

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellant,	)	COOK COUNTY.
)	
v.)	_____
)	
)	
CHARLES DAVIS, In the Matter of	)	HONORABLE
a Search Warrant,	)	JAMES E. MURPHY,
	)	JUDGE PRESIDING.
Defendant-Appellee.)	

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.
 PER CURIAM, FIRST DISTRICT, FIFTH DIVISION.

This is an interlocutory appeal by the plaintiff, People of the State of Illinois, from an order entered in the circuit court of Cook County quashing a search warrant and suppressing evidence. The search warrant was originally issued to search the defendant and certain premises for heroin, possession of which constitutes the offense of possession of a controlled substance. The trial court sustained defendant's motion to quash based upon the fact that the reliability of the informer had not been established.

The defendant has filed no brief in this cause as required by the rules of court. While we could reverse pro forma on this basis, we deem it advisable to deal with the merits of the case.

The complaint for the search warrant was made by Chicago Police Officer Robert Lombardo and before James E. Murphy, judge of the circuit court of Cook County. The complaint stated that he had probable cause to believe that heroin could be located at 2318 West Madison, 2nd floor apartment, Chicago, Illinois, and was based upon the following affidavit:

"I, Robert Lombardo a Police Officer for the City of Chicago, had on the 2 of August 73 an occasion to talk to a reliable informant who I have known for six months and who during this time has given me information relating to narcotic law violations on two occasions, each of which has led to the arrest of a narcotic law violator and the uncovering of illicit narcotics. On the 2nd of August 73 the informant stated to me that on the 1st of August 1973 he had purchased a quantity of heroin from a male negro known as Charles Davis in the apartment of Elli Williams male negro at 2318 W. Madison 2nd floor front, for the sum of \$40.00 U.S.C. The informant further stated that when he left the apartment at 2318 W. Madison 2nd floor front there was still a quantity of heroin there under the control of Charles Davis. The informant further stated that he knew the substance which he purchased from Charles Davis to be heroin because he injected a portion of it into his body and received a heroin reaction. The informant stated that he knows what a heroin reaction is because he has used heroin for over five years. Both cases given to me by this informant are still pending in the Courts."

The warrant issued. On the same day, August 2, 1973, a search was made, heroin was found and the defendant was charged by complaint with the offense of possession of a controlled substance. The trial court granted defendant's motion to quash the search warrant on the ground that the informer's reliability was not established in that his information had not led to any convictions and was uncorroborated. On the granting of the motion the cause was stricken with leave to reinstate and this appeal was taken by the State in accordance with Supreme Court Rule 604(a)(1), Ill. Rev. Stat. 1973, ch. 110A, 604(a)(1).

It is well settled that independent corroboration of an informer's tip is not required where the informer is shown to be reliable. (People v. Ranson, 4 Ill.App.3d 953, 282 N.E. 2d 462.) Convictions are not essential in establishing an

informer's reliability. The fact that the informer's information provided in the past has proved accurate can establish his reliability. People v. Lawrence, 133 Ill.App.2d 542, 273 N.E.2d 637.

In People v. Jordain, 10 Ill.App.3d 46, 294 N.E.2d 3, this court found the informer reliable on the basis of an affidavit stating that he had furnished information in the past which had led to three raids and five arrests. All of the cases were pending and narcotics were found in each case. In People v. Packer, ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 60355-60361, December Term, 1974), this court found that the reliability of an informer was adequately established by the statement that the informer had provided the police officer with information on three prior occasions and on each occasion the officer had made an arrest and confiscated narcotics. All of these three cases were pending in narcotics court. In People v. Ragusca et al., ___ Ill.App.3d ___, ___ N.E.2d ___ (No. 60396-60408, January Term, 1975), this court held the reliability of an informant established by an affidavit which stated that during the previous year the officer had three conversations with the informant and as a result of these conversations had made three arrests, all of which cases were pending and narcotics being found on each occasion.

In the case at bar, the affidavit of Officer Lombardo stated that he had known the informant for the past six months and during that time the informant had given him information on two occasions. On each occasion the information had led to the arrest of a narcotics violator and the discovery of narcotics. Both cases were still pending in Criminal Court. These allegations were sufficient to establish the reliability of the informant without further corroboration.

We have noted that it was the same judge who issued the search warrant who subsequently quashed it, even though the affidavit of Officer Lombardo in his application for search warrant contained the identical information testified to by the officer on the motion to quash. The presiding judge thereby reversed himself. If he were so convinced in hearing the motion to quash that testimony of convictions was necessary to establish the reliability of an informer it would follow that he was equally convinced at the time of issuing the warrant and therefore should not have granted the application.

The order granting the defendant's motion to quash the search warrant is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

PUBLISH ABSTRACT ONLY.



PEOPLE OF THE STATE OF ILLINOIS)
EX REL. EDWARD BEADLE,)
Relator-Appellant,)
v.)
JOHN J. TWOMEY, WARDEN, ILLINOIS)
STATE PENITENTIARY,)
Respondent-Appellee.)
APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY
HONORABLE
JOSEPH A. POWER,
JUDGE PRESIDING.

Before Downing, P.J., Stamos, and Leighton, JJ.

PER CURIAM

Edward Beadle, relator, appeals from the dismissal of his petition for a writ of habeas corpus by the circuit court of Cook County.

Relator was originally charged by two separate indictments with the crime of murder. On January 19, 1953, relator entered a plea of guilty to both indictments and was sentenced to a term of 100 years on each charge, the sentences to run consecutively. The mittimus provided that the sentence under the second indictment would not commence until the expiration of the sentence under the first indictment. On November 13, 1964, relator was granted an institutional parole from his first sentence^{1/}.

On May 15, 1973, relator filed a petition for a writ of habeas corpus seeking his release from the penitentiary. Relator's only argument in that petition was that his sentence of 100 years on the second indictment was not legally definite in that the mittimus provided that the sentence would not commence until the expiration of his sentence on the first indictment. Relator concluded that his second sentence of 100 years was invalid, and he was entitled to immediate release since he had served his sentence under the first indictment. On August 23, 1973, upon motion of the State, relator's petition for a writ of habeas corpus was dismissed.

^{1/} It is to be noted that on February 26, 1974 the relator was paroled on the second conviction.

Relator wished to appeal and the Public Defender of Cook County was appointed to represent him. After reviewing the record, the Public Defender has filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to Anders v. California (1967), 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396, a brief in support of the motion has also been filed. The brief in effect concludes that an appeal in this case would be wholly frivolous and without merit. Copies of the motion and brief were mailed to relator on January 28, 1975. He was informed that he had until April 4, 1975 to file any additional points he might choose in support of his appeal. He has not responded.

The motion and brief of the Public Defender of Cook County allege the only possible argument which could be raised on appeal is whether relator's petition for writ of habeas corpus was properly dismissed. The Illinois Habeas Corpus Act provides for the issuance of a writ of habeas corpus only where the trial court lacked jurisdiction or where something has occurred since the original judgment which would entitle the relator to a relief. People ex rel. Jefferson v. Brantley (1969), 44 Ill. 2d 31, 253 N.E.2d 378.

In the case at bar, relator's only argument is that his second sentence of 100 years for the crime of murder was not legally definite since the mittimus provided that the sentence was not to begin until the expiration of the first sentence. The Illinois Supreme Court has held that, "A sentence which is ordered to begin at the expiration of a sentence previously imposed is definite, certain and valid." (People v. Traynere (1955), 7 Ill. 2d 130, 130 N.E.2d 192. See also People v. Ferguson (1951), 410 Ill. 87, 101 N.E.2d 522; People v. Loftus (1946), 395 Ill. 479, 70 N.E.2d 573.) Relator's petition for a writ of habeas corpus was clearly without merit and was properly dismissed by the trial court.

After a full examination of all of the proceedings in accordance with the dictates of Anders, we concur in the opinion of the Public Defender that the point thus raised is not arguable on its merits, and that an appeal is wholly frivolous. Our independent examination of the record does not disclose any additional possible grounds for an appeal which are also not frivolous. Accordingly, the Public Defender of Cook County is granted leave to withdraw as counsel on appeal and the judgment of the circuit court of Cook County is affirmed.

Motion allowed;
Judgment affirmed.

74-97

3D
1 28 I.A. 36

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On April 21, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

3P

No. 74-97

16

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the Seventeenth
v.	)	Judicial Circuit,
	)	Winnebago County, Illinois.
VINCENT FREDERICK REXROTH,)	
)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court:

Defendant was sentenced to 6-20 years imprisonment upon his plea of guilty to the offense of indecent liberties with a child under the age of 16 years (Ill.Rev.Stat. 1971, ch. 38, par. 11-4). He appeals, claiming that he was not properly admonished and that the judge did not ascertain that there was a knowing plea.

Defendant first contends that the judge did not sufficiently advise him of the nature of the charge pursuant to Supreme Court Rule 402(a) (Ill.Rev.Stat. 1971, ch. 110A, par. 402(a)); that it was insufficient for the judge to advise him that he was charged with the criminal offense "of taking indecent liberties with a child", and to state the name of the child, that she was under the age of 16 and the date the offense was alleged to have occurred. Defendant argues that it was error not to refer to the type of

conduct stated in the indictment ("An act of Deviate Sexual Misconduct", pursuant to Ill.Rev.Stat. 1971, ch. 38, par. 11-4(a)(2)) which was an essential element of the particular offense. He also argues that the judge's failure to advise him of the possible affirmative defense of prostitution under the statute (Ill.Rev.Stat. 1971, ch. 38, par. 11-4(b),(2)) is reversible error.

The People contend that the combination of the admonishments and the factual basis of the plea which was recited constituted full compliance with Supreme Court Rule 402(a)(1), and we agree. The statement of the facts included a specific reference to a contact between the phallus of the defendant and a 9 year old girl. The defendant acknowledged the statement as the truth and also responded after the conclusion of the admonishments that he wished to plead guilty. There was substantial compliance with the rule. People v. Krantz (1974), 58 Ill.2d 187, 192-193.

The argument that because the statement of the facts revealed that the victim was in the home of a man who was paid money by the defendant, it was necessary to advise the defendant of the possible affirmative defense of prostitution of a 9 year old child is entirely unpersuasive.

Defendant's further contentions that he was not asked if he understood his right to persist in a plea of not guilty and his claim that he did not affirmatively waive his right to confront witnesses are also not bases for reversal. There was substantial compliance with Supreme Court Rule 402(a)(3) and (4). (People v. Krantz (1974), 58 Ill.2d 187, 193.) Defendant's failure to make a claim of prejudice further precludes him since it does not appear that real justice was denied. See People v. Dudley (1974), 58 Ill.2d 57, 60.

The judgment below is therefore affirmed.

Affirmed.

GUILD, J. and HALLETT, J. concur.

73-314

3D
28 I.A. 87

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice

Honorable WALTER DIXON, Justice

Honorable THOMAS J. MORAN, Justice

LOREN J. STROTZ, Clerk

WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 6, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

No. 73 314

3P
Abstract
FILED

IN THE

APPELLATE COURT OF ILLINOIS

MAY 6 - 1975

SECOND DISTRICT

SECOND DIVISION

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

LOWELL B. KOMIE, Conservator of the)
Estate of Laurel Morelli, Incompetent,)
Plaintiff-Appellant,)
v.) Appeal from the Circuit
TED MORELLI a/k/a RENO MORELLI,) Court of Lake County,
Defendant-Appellee.) Illinois.

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from an order of the circuit court of Lake County reducing the amount of alimony set by the divorce decree to \$400 per month from the original amount of \$800 per month.

The husband, appellee here, had an income, apparently mostly from his employment, of approximately \$27,000 per year at the time of the divorce decree in April, 1971. In October, 1972, the appellee filed a petition for modification of the divorce decree on the ground that he had recently changed jobs and his income would be materially reduced in the near future. He alleged in his petition that he had suffered a heart attack on June 18, 1972, as a result of which he had been forced to seek a less demanding position, in which he was to be paid only \$15,000 per year.

The wife contends the change in employment was merely a pretext to reduce the alimony payments and points out that the new employment is with the appellee's brother doing exactly the same kind of work as before at an arbitrarily reduced salary.

Appellant has filed her brief and excerpts from the record and has complied with the statutory requirements and rules of court regarding appeals. The appellee, however, has not seen fit to file a brief or appearance in accordance with Supreme Court Rule 341 (Ill.

Rev. Stat. 1973, ch. 110A, par. 341), and in view of this we may at our discretion either consider the merits of the appeal as best we may or simply reverse pro forma because of the failure of appellee to comply with said Supreme Court Rule. Shinn v. County Bd. of School Trustees, 130 Ill. App. 2d 908; People ex rel. Pullman Bank & Trust v. Fitzgerald, 14 Ill. App. 3d 247, and King v. King, 24 Ill. App. 3d 222.

The failure of the appellee to file a brief leaves the court without the proper presentation of the issues to which it is entitled in order to consider the appeal on its merits. Moreover, this is an especially serious dereliction where, as here, the appellee's good faith is impugned by the appellant to begin with. There is no reason for this court not to take the appellant's argument on this point at face value since the appellee has abandoned his case.

We have therefore determined to reverse pro forma.

Judgment reversed.

THOMAS J. MORAN and DIXON, JJ., concur.

73-236

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 6, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

3P
FILED

MAY 6 - 1975

No. 73-236

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	
)	
v.	)	Appeal from the Circuit
	)	Court for the 19th Judicial
EUGENE HALL,	)	Circuit, Lake County,
	)	Illinois.
Defendant-Appellant.)	

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

This is an appeal from a conviction for armed robbery.

The defendant in this appeal contends (1) his conviction is void because he was only 17 years old when he committed the crime in question and he was deprived of his constitutional rights in being tried in the Criminal Court instead of in the Juvenile Court (2) he was not properly admonished as to the maximum and minimum sentences and as to the nature of the charge as required by Supreme Court Rule 402.

The defendant's first contention is based on the then applicable section (since amended) of the Juvenile Court Act (Ill. Rev. Stat. 1971, ch. 37, par. 702-7) which at the time of his conviction provided for an age differential of under seventeen for boys and under eighteen for girls for jurisdiction under that Act. This the defendant contends was an unconstitutional classification based on sex. The pertinent language of the Juvenile Court Act at that time was as follows:

"(1) Except as provided in this Section, no boy who was under 17 years of age or girl who was under 18 years of age at the time of the alleged offense may be prosecuted under the

criminal laws of this State or for violation of an ordinance of any political subdivision thereof."

Previous to the decision in People v. Ellis, 57 Ill. 2d 127, our Supreme Court had held that the section of the Juvenile Court Act in question did not deprive a defendant of the equal^{protection} of the law (People v. McCalvin, 55 Ill. 2d 161), however, in the Ellis case decided in March, 1974, the court held that this section of the Juvenile Court Act was unconstitutional as creating a difference in jurisdiction based on sex but that the effect of its invalidity was simply to make boys and girls both subject to the higher limit of age eighteen. This seems to dispose of the first point of appeal raised by the defendant. The defendant argues that this decision by our Supreme Court is wrong and contrary to the result in other jurisdictions where a statute has been held unconstitutional. The correct and usual result, the defendant maintains, is to extend the advantage of the law to the class discriminated against where one section is held unconstitutional rather than as the Supreme Court did here, to deny the advantage to both classes.

We need spend little time with this argument inasmuch as it is not our function to review or overrule decisions of the Illinois Supreme Court. In view of People v. Ellis it appears the point is settled. Whether the original interpretation holding that the statute in question did not deprive a seventeen year old of the equal protection of the law which obtained in 1972 (People v. McCalvin, supra; People v. Little, 18 Ill. App. 3d 1081; People v. Good, 18 Ill. App. 3d 374) or the result in Ellis which held that the pertinent section of the statute did so unconstitutionally discriminate makes no difference in the result since in any event no relief is provided to the defendant here on this point by either decision. The defendant was not under seventeen years of age at the time of the commission of the offense, hence the Juvenile Court Act never properly applied to him and the^{fact that there was an} aborted hearing in Juvenile Court before his case was transferred back to the Criminal Court has no

significance in conferring any jurisdiction on the Juvenile Court.

We turn then to the second point of the appeal, the inadequacy of the defendant's admonishment under Supreme Court Rule 402 with regard to (a) the maximum and minimum sentences and (b) the nature of the charge. In considering the question of admonishment it is proper to review the history of this case. The robbery in question occurred on March 13, 1972. On May 3, 1972, the defendant entered a plea of not guilty. On July 6, 1972, after Counts II and III of the indictment had been dismissed, the defendant entered a plea of guilty to Count I of the indictment--armed robbery. At that time there was on file with the Police Department a full and detailed confession of the crime made by the defendant. Apparently plea negotiations had proceeded almost to an agreement stage at that time but on August 23, 1972, the defendant's previously entered plea of guilty was withdrawn.

At the same time the defendant petitioned for a competency hearing on the ground that he had been ill from the effect of drugs at the time he committed the offense charged. He also moved to dismiss the indictment on the ground that he was seventeen years old when he committed the offense and that he should be prosecuted only in accordance with the provisions of the Juvenile Court Act. While the pertinent section of the Juvenile Court Act did not by its terms apply to him since he was not under seventeen, the defendant's position was that it should apply to him as otherwise there would be an unconstitutional discrimination between males and females. At the hearing before the Juvenile Court the defendant's attorney refused to consent to the jurisdiction of the Juvenile Court (ostensibly on technical grounds as to the form of the petition but actually, apparently, in the hope of getting the indictment dismissed in both Juvenile and regular Criminal Courts) whereupon the case was transferred instanter back to the jurisdiction of the Criminal Court. It was following this that the defendant, having withdrawn his guilty

plea, withdrew his not guilty plea and again pleaded guilty.

This history is recounted here in some detail in order to put the question of admonishment in proper perspective. It is evident from the foregoing that the defendant did not at any time seriously contend he was not guilty. After giving a complete confession to the police he pleaded not guilty, then after negotiation pleaded guilty. He then withdrew his plea of guilty and (1) made an exculpatory plea of temporary insanity due to the effect of drugs and (2) asserted his right to be tried by the Juvenile Court but then questioned the Juvenile Court's jurisdiction and finally again entered a guilty plea after negotiations had secured him less than the maximum term for armed robbery.

At the hearing on the guilty plea the following colloquy took place:

"MR. ORI [State's Attorney]:

Your Honor, Mr. Wilson, Mr. Stepanich and I would like to inform the Court that we have reached a tentative agreement as to a disposition in this particular cause, should --

THE COURT:

Well, this is the case which I am sure we all recall that had gone quite a long ways on a tentative agreement and then everything collapsed.

MR. WILSON [For Defendant Stouder]:

We have an agreement subject to the approval of the Court.

THE COURT:

All right, tell me what it is.

MR. ORI:

The agreement would be that the Defendant Stouder would plead guilty to armed robbery and be sentenced to serve not less than five nor more than fifteen years. The Defendant Hall would plead guilty to armed robbery and receive not less than four nor more than twelve years.

3D

THE COURT: I assume from the penalties here that this is under the new Code of Corrections as of January 1, 1973, is that correct?

MR. WILSON: That's correct, your Honor.

MR. STEPANICH [for Defendant Hall]: Yes.

MR. ORI: Yes.

THE COURT: Due to the fact that we had all the extensive hearings prior hereto, or prior to this date, and I have got all of the material on it, I feel the proposed disposition is fair. The reason I'm looking through the court file, gentlemen, is it seemed to me that everything was explained to these people ahead of time, at the original hearing, but probably because it was continued so long ago, I will go through it again and then we won't have to worry about the status of the record. I'd appreciate that.

MR. WILSON:

THE COURT: Let the record show I am addressing myself to Mr. Eugene Hall and I am also addressing myself to Kent Stouder, of whom [sic] are both standing before me.

Gentlemen, you both have your attorneys here, Mr. Wilson for Mr. Stouder and Mr. Stepanich for Mr. Hall. You have both heard the proposed disposition of the case, is that correct?

MR. HALL: Yes, sir.

THE COURT: Mr. Stouder?

MR. STOUDER: Yes, sir."

The court then proceeded to explain to the defendants their right to trial by jury, their right to confront witnesses, ascertained that the guilty plea was voluntary and not induced by threats or promises, that the defendants had discussed their plea with their attorneys and that they still persisted in pleading guilty, whereupon the court accepted the guilty plea.

It is apparent from this colloquy that the court, the attorneys and the defendants were all very familiar with the issues involved and that any oversight the court may have been guilty of at the hearing where the defendant pleaded guilty for the second time, was of no consequence. Indeed, the colloquy indicates that the court acted in a thoroughly conscientious manner and leaned over backwards to make sure the defendant was not taken advantage of. While the de-

defendant was not addressed directly by the court as to the maximum and minimum sentences, the plea bargain recited them and the defendant not only stood by without demurring while the plea bargain was announced to the court by the State's Attorney, but also when directly questioned by the court answered that he had heard the "proposed disposition of the case" but still wished to plead guilty. Moreover, the defendant's sentence was less than the statutory minimum and maximum so he obviously received consideration for the negotiated plea. Under these circumstances we cannot take seriously the defendant's contention that he was not properly admonished under Supreme Court Rule 402(a) as to the minimum and maximum sentences. The case for the defendant here is not as strong as that in People v. Dudley, 58 Ill. 2d 57, where the trial judge overlooked entirely stating the plea bargain in open court, yet because the defendant obviously was not prejudiced by the omission and there was no hint that the bargain was not understood or was not honored, the Illinois Supreme Court confirmed the conviction in the following language:

"It does not follow, however, that the failure to comply with these provisions of Rule 402(b) must result in a reversal of the judgment of conviction. There is no claim that the plea of the defendant, who was represented by counsel, was not voluntary. There is no other claim of harm or prejudice to the defendant. When questioned by the judge the defendant expressed himself as being satisfied with the plea agreement which had been negotiated for him by his attorney, and even now there is no expression of dissatisfaction with the plea agreement's terms. And finally, there is no contention by the defendant that the plea agreement was not honored--no claim that the sentence imposed was not the one agreed upon. What we observed in People v. Morehead, 45 Ill. 2d 326, 332, is appropriate here: 'It is not the policy of this court to reverse a judgment of conviction merely because error was committed unless it appears that real justice has been denied* * *.'"(58 Ill. 2d 60-61.)

See also People v. Hartmann, 6 Ill. App. 3d 543, where a similar contention to that here was raised. This court in affirming the conviction said, p. 544:

"Defendant Hartmann knew precisely what would happen to him so far as sentence for this offense was concerned prior to entering his guilty plea. The constitutional standard in Illinois since 1948, both pre and post-Boykin (Boykin v. Alabama, 1969, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274), by which validity of a plea of guilty is to be determined is that it be intelligent and voluntary. Boykin does not alter or modify the standard, but only adds the requirement that if a guilty plea is to withstand appellate or post-conviction review the record must affirmatively disclose it was entered intelligently and voluntarily. (People v. Reeves, 1971, 50 Ill. 2d 28, 276 N.E. 2d 318.) The record in this case fully satisfies the constitutional standard and the Boykin requirement."

We hold, therefore, that there was substantial compliance with Rule 402(a) concerning admonishment as to the minimum and maximum sentences. There remains the defendant's contention that the admonishment as to the nature of the charge was omitted. The statement of the State's Attorney in open court in the presence of the defendant and his counsel that the plea bargain concerned a charge of "armed robbery" is sufficient to satisfy the Rule under the circumstances of this case. It must be remembered that the defendant had given the police a detailed statement which clearly set forth that the defendant robbed the victim at gun point. This confession was challenged as being coerced but its voluntariness was upheld on the motion to suppress. It is difficult to conceive how the defendant--admittedly not mentally retarded--could seriously contend that he did not understand the nature of the charge of armed robbery. Moreover, his attorney had successfully moved to dismiss the other charges in the indictment as to conspiracy and conspiracy to commit armed robbery, so he was not unaware of the distinction between armed robbery and other similar crimes. In any event, the meaning of the term "armed robbery" requires little or no explanation to understand it--it is quite self-explanatory. We cannot conceive that the defendant did not understand what he was being charged with. It is only the Court's duty to determine from the proceedings in open court

that the defendant was apprised of and understood the nature of the charge. No exact words are necessary where the notice of the charge is clear and the understanding obvious.

The judgment of the trial court is affirmed.

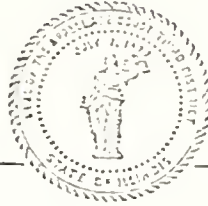
Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

74-109

People vs. Martin Ureste

STATE OF ILLINOIS



APPELLATE COURT THIRD DISTRICT
OTTAWA

At a term of the Appellate Court, begun and held at Ottawa,
on the 1st Day of January in the Year of our Lord one thousand
nine hundred and seventy-five within and for the Third District
of Illinois:

Present— PC

HON. ALLAN L. STODER, Presiding Justice

HON. JAY J. ALLOY, Justice

HON. RICHARD STENGEL, Justice

HON. TOBIAS BARRY, Justice

JOHN E. HALL, Clerk

JAMES A. CALLAHAN, Sheriff

BE IT REMEMBERED, that afterwards on

May 9, 1975 the Opinion of the
Court was filed in the Clerk's Office of said Court, in the words
and figures following, viz:

In The
APPELLATE COURT OF ILLINOIS
Third District
A. D. 1975

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of the Tenth
Plaintiff-Appellee	)	Judicial Circuit,
	)	Peoria County
vs.)	_____
)	
MARTIN URESTE,	)	Honorable
	)	Richard Eagleton,
Defendant-Appellant	)	Presiding Judge

PER CURIAM

Abstract

This is an appeal from an order of the Circuit Court of Peoria County dismissing defendant Martin Ureste's Amended Petition for Post Conviction relief. Defendant was found guilty by a jury of voluntary manslaughter and two counts of attempt murder on January 7, 1971. On March 4, 1971 defendant was sentenced to a term of not less than ten (10) nor more than twenty (20) years on each of the three charges, with all sentences to run concurrently. He originally pursued a review of his conviction by direct appeal and the conviction was affirmed. People v. Ureste, 7 Ill. App.3d 545, 288 N.E.2d 45 (3d Dist., 1972).

On March 28, 1973 the defendant filed a Petition for Post Conviction Relief and later on Feb. 6, 1974 appellant's Amended Petition for Post Conviction Relief was dismissed. His amended petition was founded upon two issues, (1) that Ureste was unable to obtain a fair trial because of prejudicial and inflammatory publicity in the media; (2) that Ureste was unable to obtain a fair trial because of prosecutorial misconduct.

Counsel was appointed to represent appellant during post conviction proceedings. The Appellate Defender has now moved in this court for leave to withdraw as counsel on appeal in accordance with the precedent of Anders v. California, 386 U.S. 738. The Appellate Defender asserts, after a careful examination of the record, a conclusion must be reached that an appeal would be wholly frivolous and without possibility of success. A motion for leave to withdraw was accompanied by a brief in support of counsel's conclusion.

The publicity complained of in defendant's Amended Petition consisted of newspaper, radio and television accounts of the proceedings at his trial, claiming that the media accounts were inaccurate and highlighted the aspects of the evidence which were most damaging to him. However, no objection based on prejudicial publicity was made during the course of the trial and no showing that any of the jurors were aware of the media accounts was made during the post conviction proceedings. The burden of proof below was on Ureste to show by a preponderance of the evidence that he was denied a fair trial due to prejudicial publicity. People v. Stovall, 47 Ill.2d 42, 264 N.E.2d 174 (1970), cert. denied, 402 U.S. 997. Ureste did not carry that burden as he could show no prejudice resulting from the publicity.

The second issue raised by defendant that he was unable to obtain a fair trial because of prosecutorial misconduct reveals that the misconduct complained of is akin to incompetence which may have been as helpful as it was allegedly prejudicial. In any event, as the issue of prosecutorial misconduct is one which could have been raised on direct appeal and was not, see People v. Ureste, supra, it is deemed waived for purposes of post conviction review. People v. Frank, 48 Ill.2d 500, 272 N.E.2d 25 (1971).

From a review of the record in this cause, we concur in defense counsel's conclusion that there is no basis for maintaining an appeal in this court on the dismissal of the post conviction proceeding and that a continuation of the appeal would be wholly frivolous and could not possibly succeed. The action of the Circuit Court of Peoria County is, therefore, affirmed and the motion of the State Appellate Defender to withdraw as counsel for defendant Martin Ureste is allowed.

Judgment affirmed and Withdrawal Motion allowed.

28 I.A.^{3D} 174

28 I.A.^{3D} 164

73-438

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 12, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

No. 73-438

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

LORETT J. DUFFY, Clerk
Appellate Court, 2nd District

Abstract

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	THE SEVENTEENTH
	)	JUDICIAL CIRCUIT,
v.	)	WINNEBAGO COUNTY,
	)	ILLINOIS.
GEORGE BAILEY,)	
)	
Defendant-Appellant.)	

Mr. JUSTICE HALLETT delivered the opinion of the court:

Following a jury trial, the defendant was convicted of armed robbery and was sentenced to serve a term of four to ten years in the penitentiary. On appeal, he contends that the testimony of the witnesses was insufficient to establish his identification as the perpetrator of the offense, and that consequently he was not proven guilty beyond a reasonable doubt.

Having reviewed the testimony, we conclude that the defendant was proven guilty beyond a reasonable doubt and affirm.

The defendant was indicted and charged with the armed robbery of Dewain Collins, which had occurred on April 19, 1973. The trial by jury commenced on July 25, 1973.

Because of the nature of the defendant's contention on appeal, it is necessary to review the identification testimony adduced at the trial. Dewain Collins, the proprietor, testified that on April 19, 1973, he arrived at the Lincolnwood laundromat at 8:45 a.m., and that as he entered the establishment, he observed three young men sitting on a ledge near the front door. He proceeded to unlock the office, where supplies for filling the vending machines were located.

After filling a pop machine and removing the money deposited in that machine, Mr. Collins returned to the office for supplies for another vending machine. He testified that after he entered the office, someone approached him asking if he had change for a dollar. According to Mr. Collins, when he turned around to respond to the inquiry, the defendant had a .22 caliber revolver pointed at him. One of the boys with the defendant took the money bag belonging to the victim and ran out of the office. The defendant then proceeded to search Collins' pockets for money. Collins stated that during this entire episode, he was within arm's reach (two or three feet) of the defendant and was positioned face to face with the defendant in an area that was illuminated by five or six 100 watt light bulbs. The incident took from three to five minutes, according to the victim's testimony.

He further testified that the defendant was one of the three youths he had observed inside the laundromat. He stated that the gunman appeared older than the other two youths and that the gunman wore a long brown or greenish-brown coat and had a dark blue or black bandana on his head. The witness stated that he was five feet ten inches tall, and that the gunman was shorter than himself. When asked to approximate the gunman's height, the witness stated that the gunman was about five feet seven inches or five feet eight inches tall.

Mr. Hicks, the caretaker of the laundromat, testified that when he unlocked the door to the laundromat on April 19, 1973, there were three youths present, who entered and sat on the ledge along the windows next to the front door. He was acquainted with two of the three boys and knew their names, but did not know the third person, who he identified in court

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as the defendant. He testified that the two boys with whom he was acquainted were younger than the defendant in appearance. Further, he testified that the defendant was wearing a long dark coat and had a blue handkerchief tied around his head. According to Mr. Hicks, the two boys with whom he was acquainted, had nothing on their heads. When Mr. Collins arrived at the laundromat, Mr. Hicks left the building, and when he returned, he was informed that there had been a robbery.

Another witness called on behalf of the State, Mildred Shaddon, testified that when she arrived at the Lincolnwood laundromat on April 19, 1973, there were three young men sitting on the ledge near the front door of the establishment. She stated that Mr. Collins came in approximately twenty or thirty minutes after she had arrived, and that during that interval the three boys remained seated. Mrs. Shaddon testified that she could not identify any of the three persons because she had not looked at their faces. However, she was able to describe their apparel. According to Mrs. Shaddon, one of the three had a blue scarf around his head and wore a long "army-like" overcoat. The person wearing this apparel seemed older to Mrs. Shaddon than the other two youths. She further testified that she had seen the person dressed in the described clothing leave Mr. Collins' office.

Eunice Gandy testified that during April, 1973, she had been employed at the Lexington Auto Clinic, located approximately three blocks from the Lincolnwood laundromat. According to her testimony, on April 19, 1973, between 8:00 a.m. and 9:00 a.m., the owner of an automobile bearing Michigan license plates came into the garage, accompanied by two other boys, and inquired about the status of repairs on his car. She informed

him that new brakes were needed and that he would have to advance money for the brakes before installation. Mrs. Gandy further testified that the person who represented himself as the owner of the vehicle appeared older than the two other persons who accompanied him, and that he wore an "army green" overcoat and had a blue scarf around his head. However, in court she asserted that she could not identify this person beyond the clothing description.

Officer Charles Sparacino's testimony related the subsequent flight, pursuit of, and arrest of the defendant. On cross-examination, this witness was asked to describe the three persons arrested. In responding, Sparacino stated that the defendant, George Bailey, physically appeared older in age than the two other youths involved.

Another witness presented in the State's case, Detective Jesse Otwell, testified that on the afternoon of April 19, 1973, after he had advised the defendant of his rights and ascertained that he understood them, the defendant denied any knowledge of or involvement in the armed robbery. According to Detective Otwell's testimony, the defendant denied being at the Lincolnwood laundromat at any time on that day. However, on the following day, the defendant admitted that his earlier statement was not true. The defendant's signed statement was read into evidence.

In his statement signed on April 20, 1973, the defendant stated that on April 19, 1973, he and two other boys had gone to the garage where his car was being repaired, and that he had been told that he would have to pay for the necessary parts before the repairs would be completed. The defendant stated that he had told the other two boys that he intended to ask

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his sister for money. According to the defendant, one of the other boys responded, "You don't have to worry about money, I'll get some. Let's go over to the laundry and get Hicks, he always carries lots of money." The defendant stated that when Mr. Collins went into the office, the other two boys followed him. However, the defendant asserted that at that point, he left the laundromat. The defendant further stated that the other two boys went home with him, where they hid the revolver and the stolen money.

The in-court testimony of the defendant was substantially the same as his signed statement. In addition, the defendant testified that he and his juvenile brother, who was one of the three youths involved, resemble each other. On cross-examination, the defendant testified that he was twenty years old, that his brother was sixteen years old, and that the third member of the group was fourteen years old. He stated that on the day of the robbery, he was wearing blue trousers, red Keds, and a short green marine field jacket. He asserted that he was presently five feet five inches tall, but that in the three months since the robbery occurred, he had become taller. He further testified that on April 19, 1973, he had not denied his knowledge of the robbery to Detective Otwell.

The jury returned a verdict of guilty and, subsequently, the defendant was sentenced to serve a term of four to ten years in the penitentiary.

On appeal, the defendant contends that the testimony of the witnesses was insufficient to establish his identification as the perpetrator of the offense. The defendant argues that the identification testimony is insufficient because

there was a discrepancy between the gunman's height as estimated by the victim, Mr. Collins, and his own testimony concerning his height at the time of the occurrence. In addition, the defendant asserts that an identification is not satisfactory when the identification rests solely on the manner in which the offender was clothed at the time of the occurrence. Consequently, the defendant contends, he was not proven guilty beyond a reasonable doubt.

The law is well settled in Illinois that "[W]here the identification of the accused is at issue, the testimony of one witness is sufficient to convict, even though such testimony is contradicted by the accused, provided the witness is credible and he viewed the accused under such circumstances as would permit a positive identification to be made. (citations omitted.)" (People v. Stringer (1972), 52 Ill. 2d 564, 569, 289 N. E. 2d 631.) (See also People v. Rodgers (1972), 53 Ill. 2d 207, 214, 290 N. E. 2d 251; People v. Catlett (1971), 48 Ill. 2d 56, 63, 268 N. E. 2d 378.) Moreover, precise accuracy in describing the facial characteristics of the accused is unnecessary where an identification is positive. People v. Catlett (1971), 48 Ill. 2d 56, 63, 268 N. E. 2d 378; People v. Brooks (1973), 13 Ill. App. 3d 1003, 1007, 301 N. E. 2d 496.

In the case at bar, the victim of the armed robbery, Mr. Collins, was the only person other than the robbers present in the office when the incident occurred. Therefore, the gunman of the group could only have been identified by the victim himself. Mr. Collins' testimony was positive and certain that the defendant was the person who held the gun. He testified that he stood face to face with the defendant at a distance of two to three feet while the defendant searched his pockets.

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The gunman was not masked, and the area was illuminated by five or six 100 watt light bulbs. The incident took between three to five minutes. Under circumstances such as these, we cannot say that the victim's identification of the defendant as the perpetrator of the offense was vague or uncertain.

Moreover, the discrepancy between the gunman's height as estimated by Mr. Collins and the defendant's own testimony concerning his height at the time of the occurrence does not render the identification of the defendant by the victim uncertain. Mr. Collins did describe the gunman as shorter than himself. The jury was aware of the discrepancy between Mr. Collins' estimation of the gunman's height and the defendant's own statement concerning his height at the time of the occurrence. It has been stated that "we may not substitute our judgment for that of a jury on questions involving the weight of the evidence or the credibility of the witnesses (citations omitted), and we will not reverse a criminal conviction unless the evidence is so improbable as to raise a reasonable doubt of guilt" (People v. Stringer (1972), 52 Ill. 2d 564, 568, 289 N. E. 2d 631.) In view of the positive in-court identification of the defendant by Mr. Collins, the physical setting in which the robbery occurred, and the corroborative evidence, we find that this discrepancy does not raise a reasonable doubt of guilt.

While some courts have held that an identification is not adequate when it is based solely on the manner in which the offender was clothed (see People v. Reed (1968), 103 Ill. App. 2d 342, 243 N. E. 2d 628; People v. Moore (1972), 6 Ill. App. 3d 932, 287 N. E. 2d 130), the record in the case at bar reveals that the identification testimony of Mr. Collins rested

upon more than a mere description of the offender's garments. The testimony of Mr. Hicks, Mrs. Shaddon, and Mrs. Gandy that one of the three youths wore a long greenish-brown overcoat and had a blue or black bandana around his head was corroborative of the victim's testimony, which in itself was sufficient to convict.

We therefore affirm the judgment.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.



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PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
 vs.)
)
 MELVIN HORTON,) HONORABLE LOUIS B. GARIPPO,
) Presiding.
 Defendant-Appellant.)

BEFORE STAMOS, LEIGHTON and HAYES, JJ.,

PER CURIAM:

Melvin Horton, defendant, and Lawrence Faulkner were charged with the offense of armed robbery in violation of Section 18-2 of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 18-2.) Defendant was also charged with the offense of unlawful use of weapons in that he possessed a shotgun with a barrel less than 18 inches in length in violation of Section 24-1(a-7) of the Criminal Code. (Ill. Rev. Stat. 1971, ch. 38, par. 24-1(a-7).) In a bench trial, defendant was found guilty of armed robbery. He was also found guilty of violating his probation on his prior conviction of armed robbery as charged in Indictment 69-2315. Defendant was sentenced to not less than 5 years nor more than 10 years in the Illinois Department of Corrections on each offense, said sentences to run concurrently. The case against Lawrence Faulkner was severed from the case at bar.

The sole issue on appeal is whether defendant was proven guilty of armed robbery beyond a reasonable doubt.

At the trial, Arthur C. Morris, testifying on behalf of the State, said that about 4 A.M. on January 2, 1972, he was on his way to visit a friend at 1150 North Sedgwick, Chicago, Illinois. Morris said he parked his car, got out, and went to the trunk to obtain a "six-pack" of beer; that he then went to the front of his car to raise the hood to

disconnect the coil wire so no one would be able to steal the car; and that as he got around to the front of the car someone said, "Don't touch, this is a stick-up" and the man, whom Morris identified as Lawrence Faulkner, stuck a sawed-off shotgun in Morris' neck. Morris was told to walk up the sidewalk, up the steps and into the lobby of the 1150 North Sedgwick building, where he was forced to lean against the wall between two elevators; that Morris saw defendant, whom he identified in court, approach with a pistol in his hand; and that he could not tell from where defendant came, but defendant came up to him, shoved a pistol in his side, and demanded money. Morris said he had approximately \$40 on his person, which defendant took; that after taking the \$40, defendant asked Morris if he had any more money, and upon receiving a negative answer defendant threatened "If I find any more money on you I'll blow your head off!"; that defendant put his hand into Morris' left pocket and recovered some change; and that defendant said, "I should blow your head off." Morris said defendant took his keys, wallet, a bank book, his prescription tinted glasses which were in a case with Dr. Franklin's name on it and his alligator shoes. Defendant started to take his coat but said, "We will let him keep that." Morris said defendant then told him to "walk slow just like nothing never happened," that Morris started walking away from the building; and that when Morris reached Orleans Street, a police squad car appeared, and he got in and told the police officers what had happened.

Morris said the police officers drove him back to 1150 North Sedgwick; that the officers saw a man coming out of the building; that they asked Morris whether the man was one of the offenders, but Morris could not identify him so the officers released him. Morris said that an individual was then observed hurrying from the hall of the building; that the police officers placed a radio call and as they got out of the car another police

car drove up with a man in it; that Morris identified him as Faulkner, one of the robbers; that some of the police officers went into the building at 1150 North Sedgwick; and that in a short time they returned with defendant, whom Morris identified as the other robber.

Morris identified Plaintiff's Exhibit No. 1 as the sawed-off shotgun that Faulkner was carrying. He identified People's Exhibit No.3 as the gun defendant used in the robbery. He also identified People's Group Exhibit No.6 as his glasses and glass case, which were taken in the robbery. Morris stated that certain keys which were taken from him in the robbery were returned to him at the police station after defendant was arrested. Morris identified People's Exhibit No.5, a black "wet-look" jacket, as the jacket defendant was wearing at the time of the robbery. On cross-examination, Morris said the robbery took about three minutes.

Chicago Police Officer Michael Shull testified on behalf of the State. He said he first saw Faulkner coming out of the building at 1150 North Sedgwick; that later Faulkner was in the back seat of a squad car; that after he advised Faulkner of his constitutional rights, Shull asked him if he wished to make a statement in view of the fact that he fitted the description of a person wanted for a robbery; that Faulkner said he was not the man they were looking for, but that earlier he had been upstairs at 1150 Sedgwick, looking out the window and had seen a robbery occur; and that if the police officers were interested in someone by the name of Horton, Horton could be located in Apartment 603. The police officers went up to Apartment 603 and arrested defendant. Shull said that at the time of the arrest he did not see defendant violate any ordinance of the City of Chicago, any Federal statute or any law of the State of Illinois. Shull said that at the time of the arrest in the apartment, Faulkner, a young woman

and a baby, four police officers, and himself were present.

Shull further testified he found the sawed-off shotgun, marked People's Exhibit No. 1, in the living room of Apartment 603, on the floor behind the couch; that the couch was approximately eight to ten feet from where defendant was standing; that nothing was covering the weapon; that he could see it from the door; and that the sofa was several feet from the wall, so that one could walk behind it and observe anything lying on the floor. Shull stated that when he was in the apartment he found People's Group Exhibit No.6, a pair of sunglasses and a sunglass case, which were lying on the floor in the hallway immediately inside the door; that he was able to observe the sunglasses and the sunglass case without moving anything; and that he took the sunglasses and case because Morris had said one of the items taken in the robbery was a pair of prescription glasses and a case. Shull further said that he found a ring of keys, which were returned to Morris so that he could drive his car; and that the keys were a few inches away from the sunglasses and case on the floor in the hallway just inside the front door. Shull stated that he found the revolver, marked Plaintiff's Exhibit No.3, inside the freezer compartment of the refrigerator, which was located partly in the living room and partly in the kitchen, along the south wall of the apartment. Shull also testified that he found People's Exhibit No.5, a black waist-length "wet-look" jacket in the hallway off the living room, leading to the bedroom, a few feet from the living room in the apartment; and that he did not have to move any furniture or objects to see the jacket. Shull said that the sawed-off weapon, People's Exhibit No.1 was loaded; that People's Exhibit No.2, the shotgun shell, was removed from People's Exhibit No.1; that People's Exhibit No.3, the revolver, was not loaded; and that there were a number of rounds of ammunition inside a plastic bag in which

the revolver was also found, but they were not the proper ammunition for the revolver.

Shull testified on cross-examination that Faulkner told the police officers the person they were looking for was in Apartment 603; that this person went by the name of Horton; and that Faulkner never mentioned Horton's first name.

In examination by the trial court, Shull said that at the time of the arrest of defendant, he noticed the young lady and the baby in the apartment; that, with the exception of the black jacket that the police officers recovered when they arrested defendant, he did not see any men's clothing in the apartment. Shull said that at the time defendant was arrested he was dressed in a shirt and trousers.

People's Exhibit No.1, the shotgun, People's Exhibit No.2, the shotgun shell, People's Exhibit No.3, the revolver, People's Exhibit No.5, the jacket, and People's Group Exhibit No.6, the tinted sunglasses and sunglass case with the name "Dr. Franklin" on it, were all introduced in evidence. People's Exhibit No.4, being certain shells which did not fit People's Exhibit No.3 but which were found in the same plastic bag with People's Exhibit No.3, was not received in evidence.

Debra Jones testified on behalf of defendant and stated that on January 2, 1972, she lived in Apartment 603, 1150 North Sedgwick, with her son, Michael; that defendant was her boyfriend; that he arrived at her apartment at approximately 10:00 or 11:00 o'clock in the morning of January 1, 1972, and that he did not leave the apartment until he was arrested. Ms. Jones said that she and defendant went to bed about 11:00 or 12:00 that night; that shortly after midnight defendant got out of bed to let Lester Horton into the apartment; that Lester stayed in the apartment about an hour or two; and that she did not know what Lester was doing while he was in the apartment. Ms. Jones said that

after Lester left, defendant locked the door, came back to bed and then got up to unlock the door when the police arrived.

Defendant, testifying in his own behalf, said that on January 2, 1972, he was in Apartment 603, 1150 North Sedgwick; that at about 12:00 midnight his brother, Lester Horton, came into Apartment 603 and at that time he did not see any revolver or any sawed-off shotgun. Defendant stated he remained in the apartment from midnight on January 2, 1972, until he was arrested by the police; that he did not take any money, keys or sunglasses from Morris; and that he was not with anyone else who took any property from Morris. Defendant said that he let Lester in the apartment; that Lester did not stay very long; and that he let Lester out. Defendant said he saw his brother again about 10 minutes before the police came up to Apartment 603; that he asked Lester why he came up to the apartment that late; that Lester was with another man named Sleepy; and that defendant did not know Sleepy's full name but that he was in the County Jail.

Defendant said his brother had a jacket that looked like the jacket identified as People's Exhibit No.5; and that the jacket was not his. Defendant put on the jacket and the court observed that the sleeve length was short. Defendant further testified his brother came to the apartment a second time just before the police came; that he did not know whether Lester had a gun; that Lester had on a long coat; and that Lester was not wearing the jacket which defendant tried on in court and was able to button up. Defendant said he was not wearing the jacket that night, but it looked like Lester's jacket. Defendant said that after Lester entered the apartment, defendant had a few words with him and then defendant went back to the bedroom.

Defendant said that at the time of trial he was 21 years old and Lester was 18 years old. Defendant said that Lester was not in the wheel chair at the time of the alleged robbery;

and that he told one of the police officers who came into the apartment and arrested him that Lester had been in the apartment, but the police officer arrested defendant anyway.

Lester Horton, testifying on behalf of defendant, said he was a brother to defendant; that he was in a wheel chair because he was shot on November 12, 1972, and was paralyzed from the chest down. Lester said that on January 2, 1972, he saw defendant in Debra's apartment; that he first saw defendant around 11:00 or 12:00 o'clock; that Lester then left the apartment and came back later; that he then had a sawed-off fourteen inch shotgun, marked as Plaintiff's Exhibit No.1; and that he brought the shotgun upstairs and put it behind the couch. Lester said he and Sleepy, together with a man named Larry and a woman named Joyce, were in the building at 1150 North Sedgwick on January 2, 1972.

Lester said he saw Morris coming towards the building and he and Sleepy robbed Morris; and that he took Morris' shoes and Sleepy took his glasses and other things. Lester said he took off the jacket and put on a coat; that he laid his jacket on his arm with the shotgun; that he went up to Apartment 603 and knocked on the door; that defendant came to the door and let him in; and that defendant then went back to the bedroom and Sleepy and Lester started playing records. Lester said that during the robbery he had the shotgun and Sleepy had the revolver; that he aimed the shotgun around Morris' chest and Sleepy had the revolver pointed towards Morris. Lester said they brought Morris into the building and forced him to lean against the wall on the first floor; that Sleepy started to search him and brought out a handful of change and passed it to Lester; that Lester took \$7 or \$8 from Morris, his eyeglasses, which were in a case, and some keys. Lester said he made Morris take off his alligator shoes; that Lester took them up to Marcella's house and gave them to her; and that Marcella gave the shoes to

somebody.

Lester said that when he and Sleepy went up to Apartment 603 the first time they were listening to records; that defendant and Debra were there; and that Debra was in the living room, but Lester did not say anything to her. Lester said that when he and Sleepy left the apartment, he, Sleepy and Larry Faulkner went to an apartment in another building and had a few drinks. After they came out of the building, they robbed Morris and after robbing him they took the shoes up to Marcella Brown and left them there. They then went to Debra's house; that defendant opened the door; that Lester went in and defendant went into the bedroom; that Lester laid the shotgun behind the couch and got a plastic bag, put the pistol in the plastic bag with some bullets and put the bag in the refrigerator; and that then Lester and Sleepy left.

Lawrence Faulkner, the other original defendant, testifying on behalf of defendant, said he was arrested at about 4:00 A.M. on January 2, 1972; that at the time he had a conversation with some police officers and told them where to look for the people they were interested in; that the names of the people were Lester Horton and Sleepy; and that he did not know Sleepy's name. On cross-examination, Faulkner said that he was arrested at the corner of Elm and Sedgwick while he was walking home; that he was wearing a pair of green pants, brown shoes, a green knit hat and a cashmere coat; and that the coat was about two feet above his kneecap. Faulkner said he was coming from Joyce Taplin's house, Apartment 503, 1150 North Sedgwick, when he was placed under arrest; that the police took him back to Apartment 603; that they put him in front of the door and knocked, and when defendant came to the door Faulkner said "Larry"; that the door opened and the police officers pushed him in; that they asked Faulkner whether defendant was one of the robbers and Faulkner said, "No, his brother"; and that then the police started searching the house.

Faulkner said that when he was coming in the building about 3:45 A.M. he saw Lester and Sleepy with some guns; that Lester had a gun at his side and Sleepy had one in his pocket; that Faulkner did not say anything to them; and that Joyce and he went upstairs. Faulkner said the police officers told him, "You are under arrest for armed robbery"; that he told them he did not do it; that the police officers asked him, "Do you know who did it?"; and that he said, "Yes"; and that when the police officers told him that he had committed the robbery they did not tell him where the robbery had taken place.

At the trial court's suggestion, it was stipulated that the facts at the present trial would stand as the facts on the hearing of violation of probation on defendant's prior conviction of armed robbery as charged in Indictment 69-2315 without a filing of a written rule. The trial court commented that defendant forfeited his bond in the case at bar and it was only because he was arrested on another charge that defendant appeared in court and stood trial in the case at bar. The trial court then sentenced defendant to a minimum of 5 years and a maximum of 10 years in the Illinois Department of Corrections on each offense, to run concurrently.

Defendant argues that the identification by Morris of defendant and Lawrence Faulkner was inadequate and suggestive. On the contrary, the record discloses that Morris' identification was positive and spontaneous. Immediately after the crime, Morris gave the police a detailed description of the robbers, their clothing, and their weapons. Less than 15 minutes after the robbery, he spontaneously and positively identified Lawrence Faulkner as one of the two robbers. Shortly thereafter Morris identified defendant as the other robber. Police Officer Michael Shull stated that defendant matched the description of one of the robbers given him by Morris. At trial, Morris again identified

defendant as one of the robbers.

The law is clear that the positive, credible identification by one witness with opportunity to see the defendant is sufficient to sustain the conviction even in the face of contradiction by the Defendant's testimony. (People v. Tribbett, 41 Ill.2d 267, 242 N.E.2d 249; People v. Griffin, 12 Ill.App.3d 193, 297 N.E.2d 770; People v. Taylor, 18 Ill.App.3d 367, 309 N.E.2d 642.) The identification does not have to be under perfect conditions or for a long period of time. People v. Stringer, 52 Ill.2d 564, 289 N.E.2d 631.

Defendant also asserts that there were discrepancies in Morris' description of the clothing worn by the robbers. Morris identified the black "wet-look" jacket, received into evidence as Plaintiff's Exhibit No.5, as the jacket defendant wore at the time of the offense. Defendant testified that the jacket was not his but that it looked similar to one his brother Lester owned. Defendant put on the jacket in court and the trial judge noticed that the sleeve length was short, but defendant was able to put it on entirely and could button it up. Morris' description of the robbers' apparel was clear and unimpeached. Any discrepancies raised by defendant were without significance. Neither the discrepancies nor what defendant characterizes as Morris' inadequate opportunity to observe presents a basis for reversal. People v. Riles, 10 Ill.App.3d 772, 775, 295 N.E.2d 234; People v. Perry, 21 Ill.App.3d 18, 22, 315 N.E.2d 173; People v. Cox, 21 Ill.App.3d 728, 732-733, 315 N.E.2d 615.

Defendant criticizes the identification of Faulkner and defendant at the scene of the robbery as "one-man show ups for Faulkner and for defendant soon after the robbery." The return of Faulkner and defendant to the scene of the robbery and the "on the scene" identification were not unnecessarily suggestive. (People v. Elam, 50 Ill.2d 214, 278 N.E.2d 76; People v. Young,

46 Ill.2d 82, 263 N.E.2d 72; People v. Ellis, 24 Ill.App.3d 870, 321 N.E.2d 722.) Further, it was shown by clear and convincing evidence that the in-court identification of defendant by Morris, the sawed-off shotgun carried by Faulkner, the gun defendant used in the robbery, Morris' glasses and glass case and his keys had an independent origin arising from uninfluenced observations of defendant. (People v. Bey, 51 Ill.2d 262, 281 N.E.2d 638.) Defendant's only basis for saying that the identification of Faulkner was improper is that Morris was unable to identify him when he was "peeping out of the building" but was able to identify him as one of the robbers when he was later returned to the scene of the robbery. It is apparent that Morris' inability to identify Faulkner at first was attributable to the distance between them. Further, there is no evidence that the police officers influenced Morris' identification of Faulkner and defendant as the robbers.

Defendant also argues that the confession of his brother, Lester, that he was the robber and not the defendant, coupled with defendant's testimony and the alibi testimony of his girl friend, Debra Jones, that he was in her apartment at 1150 North Sedgwick from about 10:00 A.M. on the morning of January 1, 1972, until he was arrested about 4:00 A.M. on the morning of January 2, 1972, raises a reasonable doubt as to the guilt of defendant. However, there is no obligation on the trial court to believe the alibi testimony over positive identification of the defendant, even though given by a greater number of witnesses. (People v. Jackson, 54 Ill.2d 143, 149, 295 N.E.2d 462.) Further, in a bench trial it is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony and unless the evidence is so unsatisfactory as to raise a reasonable doubt of the defendant's guilt, the finding of the trial court will not be disturbed. (People v. Catlett, 48 Ill.2d 56, 268 N.E.2d 378; People v. Arndt, 50 Ill.2d 390, 280 N.E.2d 230; People v. Spriggs, 20 Ill.App.3d 804,

314 N.E.2d 573.) On appeal, the determination of the trial judge, who had the opportunity to view the witnesses and hear their testimony, will not be lightly set aside. People v. McNeal, 8 Ill.App.3d 109, 289 N.E.2d 193; People v. Enright, 1 Ill.App.3d 654, 275 N.E.2d 294.

Defendant argues that it was reversible error for the State not to call Sleepy, Marcella Brown, Lester Horton's girl friend, and Joyce Taplin, Lawrence Faulkner's girl friend. However, this issue was not raised in the trial court and the law is clear that under such circumstances the issue has been waived. (People v. Eubank, 46 Ill.2d 383, 263 N.E.2d 869; People v. Fair, 17 Ill.App.3d 109, 308 N.E.2d 162.) Moreover, in the case at bar, there is ample evidence in the record to sustain the conviction of defendant without the necessity of the State calling Sleepy, Joyce Taplin or Marcella Brown as witnesses, especially since they were all known to defendant or his friends prior to trial. People v. King, 4 Ill. App.3d 1066, 282 N.E.2d 746.

Defendant also argues that the trial court should have explained why it accepted the identification of defendant by the complaining witness and rejected the evidence that defendant's brother and Sleepy perpetrated the robbery. This point also was not raised in the trial court and, therefore, it cannot be raised for the first time on appeal. (People v. Eubank, 46 Ill.2d 383, 263 N.E.2d 869; People v. Fair, 17 Ill.App.3d 109, 308 N.E.2d 162.) Also, it has been held that a trial court draws factual conclusions from conflicting testimony and need not specify each fact considered in making its decision. People v. Spencer, 131 Ill. App.2d 551, 556, 268 N.E.2d 192.

The trial court properly found defendant guilty.

The judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

LEIGHTON and HAYES, JJ., concur.

PUBLISH ABSTRACT ONLY.

JUN 9 1975

61066

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM CIRCUIT
	)	COURT OF COOK COUNTY.
Plaintiff-Appellee,)	
)	
v.)	
)	
ALFRED JACKSON,	)	HONORABLE
	)	MARVIN E. ASPEN,
Defendant-Appellant.)	)	PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, J., LORENZ, J., AND SULLIVAN, J.

Defendant was found guilty after a bench trial of the crime of attempt murder (Ill. Rev. Stat. 1973, ch. 38, par. 8-4). He was sentenced to a term of four to 12 years.

Defendant wished to appeal, and a public defender of Cook County was appointed to represent him. After examining the record, the public defender filed a motion in this court for leave to withdraw as appellate counsel. Pursuant to the requirements set out in Anders v. California, 386 U.S. 738, a brief in support of the motion has also been filed. The brief states that the only possible arguments which could be raised on appeal are (1) that defendant did not knowingly and understandingly waive his right to a trial by jury, (2) that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt, and (3) that defendant's sentence is excessive and he should have been granted probation. The brief concludes that an appeal on these issues would be wholly frivolous and without merit. Defendant was mailed copies of the motion and brief on February 10, 1975, and informed that he had the opportunity until April 8, 1975, to file any additional points he might choose in support of his appeal. He has not responded.

At trial Lawrence Moore, a police officer for the Village of Robbins, testified for the State that on July 28, 1973, at 6:30 P.M., he received information regarding a shooting which had taken

place in the Village. He received the name of the offender, Alfred Jackson, as well as a description of the offender and the vehicle involved. Officer Moore testified that he had known defendant previously. A short time later Officer Moore was in his squad car with Michael Reid when he observed the wanted vehicle being driven by defendant proceeding eastbound on 137th Street. Officer Moore testified that he gave pursuit in his police vehicle attempting to stop defendant's car by the use of his siren and lights. Defendant's vehicle came to a stop, and Officer Moore pulled his squad car directly behind defendant's vehicle. Defendant jumped out of the vehicle and swore at Officer Moore. Defendant then pulled a gun and fired five or six shots directly at Officer Moore. One of the shots struck the driver's door of Officer Moore's squad car. Officer Moore testified that he then pulled his pistol and returned fire. Defendant was coming toward the squad car, and Officer Moore proceeded across the street to find cover. Defendant pointed his weapon inside the squad car, and Michael Reid jumped out screaming, "Don't shoot me." A second Robbins police vehicle containing Officers Warren and Williams arrived at the scene. When defendant observed the second police vehicle, he got into Officer Moore's squad car and fled. Officer Moore testified that he then got into the squad car with Officers Williams and Warren to pursue defendant. Officer Moore found his squad car abandoned in a forested area of Riverdale, Illinois. After other police arrived to assist them, defendant was placed under arrest in the forested area.

Michael Reid, a fireman for the Village of Robbins, testified for the State that on the evening of July 28, 1973, he was being given a ride home in a Village of Robbins police car by Officer Moore. At that time Officer Moore gave pursuit to a

vehicle being driven by defendant. After defendant's vehicle stopped, defendant got out of his car and began screaming something. Defendant pulled a gun and began to fire at Officer Moore. Defendant approached the squad car, and Officer Moore backed off down the street. After a second Village of Robbins police vehicle arrived, defendant fled in Officer Moore's squad car. Officer Moore entered the second police vehicle and gave pursuit.

Robert A. Warren, a police officer for the Village of Robbins, testified for the State that on July 28, 1973, in the early evening hours, he and his partner, Carl Williams, were on patrol when in the area of 136th and Kedzie they heard gun shots. As they approached the scene, they observed defendant dressed in civilian clothes approaching a Village of Robbins police vehicle. Defendant got into the squad car and fled. Officer Moore then got into his squad car, and they gave chase to defendant. They found Officer Moore's squad car abandoned with the front end resting in a ditch in a forested area of Riverdale, Illinois. They called for assistance. Defendant was subsequently placed under arrest by a Dolton police officer.

David J. Gall, a police officer for the Village of Dolton, testified for the State that in the evening hours of July 28, 1973, he responded to a call for assistance from a Riverdale squad car that was in pursuit of another vehicle. He proceeded to Whistler's Woods in Riverdale, Illinois. There he observed an abandoned Robbins police car facing into the woods. Officer Gall testified that he positioned himself at the north end of the woods and began making a search of the wooded area. He observed defendant lying on his back underneath some bushes and placed him under arrest. No gun was found on defendant or in the area where he was arrested.

Alfred Jackson, defendant, testified on his own behalf that

on July 28, 1973, he was returning to his home. As he got out of his car he observed a police vehicle behind him and Officer Moore pointing a gun at his head. The police vehicle did not have the lights or siren on. Officer Moore ordered him to halt and fired a shot at him. Defendant testified that he then ducked behind the door of his car. Officer Moore then approached his vehicle and fired a second shot. Defendant testified that he jumped into Officer Moore's squad car and fled. Defendant testified that he stopped in a forest preserve area because the car had overheated. Defendant fled into the forest preserve area. Defendant testified that he subsequently surrendered to a Dolton police officer. Defendant denied that he had a weapon or that he fired any shots during the incident.

William Patterson testified that on July 28, 1973, he was walking toward defendant's house when he observed a police vehicle stopped in front of the home. Officer Moore got out of the police vehicle and ordered defendant to halt. Officer Moore then fired several shots, and defendant ducked down behind his car. Defendant then got into the squad car and fled. Patterson testified that he did not see a gun in defendant's hand.

The motion and brief of the public defender state that the first possible argument which could be raised on appeal is that defendant did not knowingly and understandingly waive his right to a trial by jury. There is no specific formula for determining whether a defendant's waiver to a right to a jury trial is knowingly and understandingly made. Each case depends upon the particular facts and circumstances of that case. People v. Richardson, 32 Ill.2d 497, 207 N.E.2d 453; People v. Diesel, 128 Ill. App.2d 388, 262 N.E.2d 15.

In the case at bar the record reflects that when defendant's case was called, privately retained defense counsel in defendant's

presence informed the trial judge that it would be a bench trial. Thereafter the trial judge personally addressed defendant and informed him that he had a right to a trial by jury. The trial judge advised defendant that a jury trial meant that 12 citizens would determine his guilt or innocence. Defendant stated that he understood and that he wished to waive his right to a jury trial. Thereafter defendant executed a written jury waiver. Under these circumstances we conclude that defendant knowingly and understandingly waived his right to a trial by jury after proper admonishments by the trial judge.

The next possible argument which could be raised on appeal is that the evidence was insufficient to establish defendant's guilt beyond a reasonable doubt. The rule is well established that in a bench trial it is the responsibility of the trial judge to determine the credibility of witnesses and the weight to be given to their testimony. Only where the evidence is so unsatisfactory as to raise a reasonable doubt as to defendant's guilt will the findings of the trial court be disturbed. People v. Clay, 55 Ill.2d 501, 304 N.E.2d 280.

Defense counsel states that it could be argued that the State's failure to produce the weapon used by defendant created a reasonable doubt as to his guilt. However, the facts adduced at trial demonstrated that after defendant abandoned the Robbins police vehicle which he had stolen, he was free in a heavily forested area for a period of time sufficient to provide an ample opportunity for him to dispose of the weapon. Under these circumstances, the failure of the State to produce defendant's weapon does not create a reasonable doubt as to his guilt.

It could also be argued that defendant did not have the specific intent to commit the crime of murder. However, it is well settled that intent is a state of mind which can be shown

by surrounding circumstances. The intent to take a life may be inferred from the character of the assault, the use of a deadly weapon and other circumstances. (People v. Koshiol, 45 Ill.2d 573, 262 N.E.2d 446.) Here the State's evidence demonstrated that after he was stopped, defendant exited his vehicle and fired five or six shots directly at Officer Moore. One of the shots fired by defendant struck the driver's door of Officer Moore's vehicle. Defendant approached the squad car while Officer Moore retreated. Upon the arrival of a second police vehicle, defendant fled the scene in Officer Moore's squad car. The trial judge was fully justified in concluding that these facts were sufficient to establish that defendant intended to kill Officer Moore.

It could also be argued that the conflicts and testimony of the State's witnesses created a reasonable doubt as to defendant's guilt. However, minor discrepancies in the testimony of witnesses such as those in the case at bar affect only the credibility of witnesses which is for the trier of fact to determine. (People v. Reese, 54 Ill.2d 51, 294 N.E.2d 288.) Here two State's witnesses testified that defendant repeatedly fired a gun directly at Officer Moore. When a second police car arrived on the scene, defendant fled in Officer Moore's squad car. Defendant was arrested only after a long automobile chase and search of a wooded area. The testimony of the State's witnesses was positive, credible and sufficient to establish defendant's guilt beyond a reasonable doubt.

The final argument which could be raised on appeal is that the sentence imposed on defendant is excessive, and that he should have been granted probation. The granting of probation rests within the discretion of the trial court, and the trial court's determination is subject to review only to the extent of ascer-

taining whether the trial court did in fact exercise discretion or whether it acted in any arbitrary manner. People ex rel. Ward v. Moran, 54 Ill.2d 552, 301 N.E.2d 300; People v. Saiken, 49 Ill.2d 504, 275 N.E.2d 381.

Here the record reflects that defendant was convicted of the attempt murder of a police officer. Previously defendant had been placed on probation for a separate offense. The minimum sentence imposed by the trial judge was the minimum possible sentence allowed by law for the crime of attempt murder. (Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(c)(1).) After a complete review of the facts adduced at trial and defendant's prior record, we do not believe that the trial judge abused his discretion in denying defendant's application for probation and imposing a sentence of four to 12 years.

We have examined the record and concur in the opinion of the public defender that none of the arguments thus raised has substantial merit. Our inspection of the record did not disclose any additional possible grounds for an appeal which are also not frivolous.

Accordingly the Public Defender of Cook County is granted leave to withdraw as counsel on appeal, and the judgment is affirmed.

AFFIRMED.

Abstract only.

3D
28 I.A. 297

3D
28 I.A. 224

74-296

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 9, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

MAY 9 - 1975

No. 74-296

LOREN J. STROTZ, Clerk
Appellate Court, 2nd DistrictIN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

EXHIBIT

IN THE INTEREST OF	)	Appeal from the Circuit Court
	)	for the 16th Judicial Circuit,
ROBERT VASQUEZ,	)	Kane County, Illinois
)	
A Minor.)	

MR. JUSTICE DIXON delivered the opinion of the court:

A motion to withdraw has been filed in the instant case by Ralph Ruebner, Deputy Defender, and Mary M. McCormick, Assistant Defender, Office of the State Appellate Defender, Second District, who have been appointed as counsel for Robert Vasquez, respondent in connection with his appeal. The motion and the record in this cause show:

That, after an adjudicatory hearing on March 28, 1974 respondent was adjudged a delinquent by the Circuit Court of Kane County. A dispositional hearing was held on April 16, 1974 and respondent was committed to the Department of Corrections--Department of Mental Health Joint Children's Program at Tinley Park Mental Health Clinic;

That thereafter the Office of the State Appellate Defender was appointed to represent respondent on appeal;

That on Feb. 11, 1975 notice was mailed to the respondent notifying him that a Motion for Leave to Withdraw was filed with the Appellate Court of the Second Judicial District with regards to his appeal, and the consequences of such a motion;

The Motion for Leave to Withdraw and Brief in support thereof is pursuant to the ruling announced in the case of Anders v. California,

386 U.S. 738. After a careful examination of the record in the case at bar and a thorough consideration of every possible issue, counsel has concluded that an appeal would be wholly frivolous and could not possibly be successful.

A copy of counsel's brief has been furnished to the defendant and time allowed him to raise any points that he chooses.

We have, therefore, examined the proceedings completely in this cause for the purpose of deciding whether the appeal is wholly frivolous.

A Petition that respondent be adjudicated a delinquent child for the reason that he was alleged to have committed the offenses of; Criminal Damage to Property in violation of Ill. Rev. Stat., ch. 38, sec. 21-1 (1973); Threat; and Attempt (Theft) was filed by Oscar Schrieber, an adult person and resident of Kane County, Illinois, in the Circuit Court of Kane County on March 19, 1974.

On March 19, 1974, Mr. John C. Banbury, Assistant Public Defender appeared on behalf of respondent before the Honorable Neil E. Mahoney and requested a substitution of judge. The case was transferred to Judge Alfred Y. Kirkland for adjudication.

A hearing was held before Judge Kirkland on March 28, 1974. Mr. Fred Morelli, Public Defender, appeared as counsel for respondent. The State moved to strike Paragraph 2 of the Petition for Adjudication, and to substitute the words "Arden Orbesen" for "unknown persons" in Paragraph 3 of the Petition. The motion was granted without objection.

Following the introduction of testimony concerning Paragraphs 1 and 3 of the Petition, the Court found respondent not guilty of Attempt Theft, but that respondent was guilty of the offense of Criminal Damage to Property as alleged in Paragraph 1 of the Petition.

The Court ruled that it was not essential to the State's case, that testimony be received concerning respondent's age.

The Court thereafter adjudicated respondent a delinquent. A dispositional hearing was set for that afternoon but was not held until April 16, 1974 at which time various alternatives were considered before respondent was committed to the Department of Corrections-Department of Mental Health Joint Children's Program at Tinley Park Mental Health Clinic. No court reporter was present at the hearing but an affidavit of the Judge has been furnished.

Appellate counsel has considered whether failure to personally serve respondent with the Petition deprived the court of jurisdiction as alleged in respondent's motion for a new trial. Although such an error is a matter of in personam jurisdiction, the error was waived by trial counsel at the hearing held March 19, 1974, where trial counsel requested reassignment of the case. Such an act admitted that the trial court had jurisdiction. People ex rel. Houghland v. Leonard, 415 Ill. 135.

Appellate counsel has further considered whether the State had an obligation to prove that respondent was a juvenile. The cases in Illinois indicate that it is not an essential element of a State's case to show that a defendant in a felony case is not a minor, unless there is evidence in the record to show that defendant is a minor. (People v. Cavaness, 21 Ill. 2d 46; People v. Headrick, 65 Ill. App. 2d 169.) Counsel believes that a similar rule would be appropriate in a juvenile proceeding. In any event, counsel admitted in argument that respondent was fourteen (14) years of age.

Appellate counsel has considered whether respondent was found guilty beyond a reasonable doubt of the offense of Criminal Damage to Property, and has concluded that sufficient evidence was presented by the State at the Adjudicatory Hearing to prove respondent guilty of that offense beyond a reasonable doubt. The offense of Criminal Damage to Property is defined as follows:

"Any of the following acts shall be a Class A misdemeanor and any act enumerated in subsection (a) or (f) when the damage to property exceeds \$150 shall be a Class 4 felony;

(a) Knowingly damages property of another without his consent * * *" Ill. Rev. Stat., ch. 38, Sec. 21-1(a) (1973).

At the adjudicatory hearing, two counselors from the Kane County Youth Home testified that they had seen Robert Vasquez punch the metal leg of a chair through one of four glass windows in the Home. Marlan Tevis, Superintendent of the Kane County Youth Home, testified that he did not give Robert Vasquez his consent to break any windows in the home. The supervisor on duty at the time of the incident also testified that he did not give Robert Vasquez consent to break the window. The finding that respondent was guilty beyond a reasonable doubt supports a determination that he was a delinquent child. Ill. Rev. Stat. ch. 37, sec. 702-2 (1973).

Appellate counsel has further considered whether respondent was prejudiced by the absence of a court reporter at the dispositional hearing. Counsel has concluded that the affidavit of Judge Mahoney, acquiesced in by trial counsel, setting forth those dispositional alternatives considered at the hearing provides an adequate basis for Judge Mahoney's order of commitment.

Appellate counsel has further considered whether Judge Mahoney should have been permitted to preside over the dispositional hearing, and enter a dispositional order in the matter, since he had re himself at the hearing of March 19, 1974. Appellate Counsel has been unable to find any prejudice to respondent, in light of the affidavit submitted by Judge Mahoney.

After a full examination of all the proceedings, we find the appeal to be wholly frivolous and that the judgment of the Circuit Court of Kane County should be affirmed and that there has been

adequate compliance with Anders v. California, supra.

Having been satisfied that counsel has diligently investigated the possible grounds of appeal and agreeing with counsel's evaluation of the case we also authorize withdrawal of counsel pursuant to the Motion to Withdraw.

Affirmed.

Rechenmacher, P.J., and T.J. Moran, J., concur.



60757-60758 Cons.

EXECUTIVE AUTO LEASING CO. and	)	APPEAL FROM CIRCUIT
KEYSTONE CAR LEASING CORP.,	)	COURT OF COOK COUNTY.
)	
Plaintiffs-Appellants,)	
)	
v.)	
)	
ERWIN PELZ and STEPHANIE PELZ,	)	HONORABLE
	)	WILLIAM PATTERSON,
Defendants-Appellees.	)	PRESIDING.

PER CURIAM: FIRST DISTRICT, FIFTH DIVISION.

BEFORE DRUCKER, LORENZ AND SULLIVAN, JJ.

On December 4, 1973, Keystone Car Leasing Corporation secured a default judgment against both defendants in the sum of \$2,313.91. On the same day Executive Auto Leasing Co. secured a default judgment against defendant Erwin H. Pelz in the sum of \$3,494.55. On May 2, 1974, defendants filed petitions, supported by affidavits, to vacate the judgments under the provisions of Section 72 of the Civil Practice Act (Ill. Rev. Stat. 1973, ch. 110, par. 72). On June 5, 1974, the trial court vacated the default judgments.

The only issue presented on appeal is whether the trial court properly granted defendants' Section 72 petitions to vacate the default judgments.

The affidavits of Erwin H. Pelz, which are substantially the same in both cases, alleged that after he was served with summons he retained an attorney to represent him, to appear and defend him, and that he paid the attorney \$25 on account of his attorney fees, but said attorney failed and refused to file the appearance of defendant, which resulted in the respective plaintiffs obtaining default judgments against defendants; that the respective plaintiffs made various errors in billing defendants under a lease agreement for a 1972 Chevrolet Monte Carlo at the rate of \$160 per month for two years, and for a 1973 Chevrolet Nova at the rate of \$169 per month for two years; that the

parties failed to agree on the amount due, and plaintiffs demanded the return of the respective automobiles; that defendants returned said automobiles to the respective plaintiffs; that defendants were at all times ready and able to have the errors of the respective plaintiffs' billings corrected and pay the proper amount due, but the respective plaintiffs refused to provide such a corrected amount for defendants to pay; and that it would be improper and unconscionable to permit the respective plaintiffs to have judgments for the full amount claimed under said leases after the respective plaintiffs repossessed the automobiles.

Stephanie Pelz filed an affidavit in which she alleged she returned the Nova sedan and two sets of keys to Dale Bugasch, Treasurer of Executive, on September 7, 1973.

Neither plaintiff filed a responsive pleading to the affidavits of defendants.

Opinion

Plaintiffs limit their argument to the issue of whether the trial court erred in vacating the default judgments because the attorney for defendants failed, neglected and refused to file an appearance for defendants. Plaintiffs state:

"[A]ssuming, arguendo, that the defendant has a 'meritorious defense' to the plaintiffs' suits he is not entitled to a vacation of the default judgments unless he shows that 'he and his attorney have exercised reasonable diligence.'"

Plaintiffs state that in Doetsch Bros. Co. v. Budron Excavating Co., 10 Ill. App.3d 620, 295 N.E.2d 28, this court "concluded that the failure of counsel to file an appearance justified the vacation of the default judgment" but suggests "that Doetch [sic] Bros. conflicts with the applicable decisions of the Illinois Supreme Court and, therefore, must be overruled or, at the very least, disregarded."

This court will not limit its review to the single issue of whether the failure of defendants' attorney to file their appearance justified the vacation of the default judgments but, rather, will examine the entire record to determine whether the trial court abused its discretion in vacating the judgments. It has been held that a petition to set aside a default judgment under Section 72 is in the nature of a new proceeding which addresses itself to the equitable powers of the court and where, in the interests of justice and fairness, a default judgment has been entered under unfair, unjust, or unconscionable circumstances, that judgment will be vacated. (Marks v. Gordon Burke Steel Co., 14 Ill. App.3d 191, 301 N.E.2d 835.) It is only where there has been an abuse of discretion that the judgment of the trial court will be reversed. (Geo. F. Mueller & Sons, Inc. v. Ostrowski, 19 Ill. App.3d 973, 313 N.E.2d 684; Stackler v. Village of Skokie, 53 Ill. App.2d 417, 203 N.E.2d 183; Calvo v. Willson, 59 Ill. App.2d 399, 405, 207 N.E.2d 496 (petition for leave to appeal denied, 32 Ill.2d 625).) In a Section 72 proceeding new issues are made up, and it is incumbent upon respondent to plead to the petition in some manner and to support his defense thereto by evidence or affidavit. Fox v. Dept. of Revenue, 34 Ill.2d 358, 361, 215 N.E.2d 271; Libert v. Turzynski, 129 Ill. App.2d 146, 150, 262 N.E.2d 741.

It is uncontested that in the case at bar defendants' Section 72 petitions alleged a meritorious defense. Because of the failure of the plaintiffs to respond to the petitions, the facts alleged therein will be taken as true. (Libert; Elfman v. Evanston Bus Co., 27 Ill.2d 609, 613, 190 N.E.2d 348.) It is uncontradicted that upon receiving summons, Erwin Pelz engaged an attorney to handle this matter and paid him \$25 as part of a retainer fee. It was stated in Kimbrough v. Sullivan, 131 Ill. App.2d 313, 316, 266 N.E.2d 717, that:

". . . reliance on a person reasonably believed to be handling the defense has been held to be excusable. E.g., Gary Acceptance Corp. v. Napolillo, 86 Ill. App.2d 257, 263 (defendants' attorney told them to ignore summons); Spencer v. American United Cab Ass'n, 59 Ill. App.2d 165, 167 (defendants sent court papers to the state Department of Insurance because their insurer was being liquidated); Dann v. Gumbiner, 29 Ill. App.2d 374, 382 (defendant was twice told by his insurance broker that the suit was being taken care of); Boyle v. Veterans Hauling Line, 29 Ill. App.2d 235, 243-244 (defendant relied on his insurance broker); Elfman v. Evanston Bus Co., supra, at pages 611-612 (defendant relied on its attorney.)"

On facts substantially similar to the instant case the court in Doetsch Bros. Co. held that a reasonable excuse was presented.

Furthermore, the record is devoid of any showing that plaintiffs had execution issue on the default judgments within 30 days of December 4, 1973. "Failure to sue out an execution during the thirty day period in which a decree may be directly attacked is in itself a cloud on the conduct of the party taking the default judgment, and the court may consider such delay when deciding a section 72 petition." Park Ave. Lumber v. Nils A. Hofverberg, Inc., 76 Ill. App.2d 334, 348, 222 N.E.2d 49, 56.

In light of the record in the case at bar, the ends of justice will be best served by a contested hearing on the merits. Riley v. Unknown Owners, 6 Ill. App.3d 864, 867, 286 N.E.2d 800.

In Lynch v. Illinois Hospital Services, Inc., 38 Ill. App. 2d 470, 475, 187 N.E.2d 330, the court said:

"A default should be entered when, as a last resort, it is necessary to give the plaintiff his just demand. It should be set aside when it will not cause a hardship upon the plaintiff to go to trial on the merits."

The Lynch case was cited with approval in Libert.

The trial court did not abuse its discretion when it granted defendants' Section 72 petitions and vacated the default judgments. Doetsch Bros. Co.

The judgments are affirmed.

AFFIRMED.

Abstract only.

28 I.A. 320
FILED
 APR 29 1975
Walter T. Simmons
 FIFTH DISTRICT OF ILLINOIS
 CLERK APPELLATE COURT

IN THE
 APPELLATE COURT OF ILLINOIS
 FIFTH DISTRICT

CYRILLA WATSON,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of St. Clair
	)	County, Twentieth Judicial Circuit.
vs.)	
)	
THOMAS A. WATSON,	)	Honorable Carl Becker,
	)	Presiding Judge.
Defendant-Appellant.))	

Mr. JUSTICE G. MORAN delivered the opinion of the court:

Defendant appeals from that portion of a divorce decree relating to alimony, child support, attorney's fees, and other payments ordered by the trial court to be made by the defendant husband.

The plaintiff, Cyrilla Watson, was granted a divorce from the defendant, Thomas Watson, and was awarded custody of their two children, aged five and six. As part of the decree defendant was ordered to pay \$25 support per child per week and \$25 per week alimony for a period of 12 months and \$125 support per child per month and \$150 per month alimony thereafter.

By prior agreement the parties had listed their residence for sale, with a proviso for public sale if not otherwise sold within 120 days. The decree incorporated this agreement and ordered that the proceeds from the sale should be used to satisfy existing liens or indebtedness against the property, with any remaining proceeds to be divided equally among the parties. The plaintiff was allowed to reside in the property for 120 days.

The decree awarded their 1969 Corvette to the plaintiff and ordered the defendant to make the \$96 monthly payments on the car until the \$1536 balance owed on its purchase was satisfied. The decree also ordered the defendant to pay the accumulated debts of the parties and to pay plaintiff's attorney's fees of \$600.

Defendant now contends that the terms of the decree were improper in two respects: (1) that the burden placed upon him in meeting the obligations is beyond his financial ability; and (2) that the trial court was without authority to order an increase in child support and alimony to take effect one year after the decree.

The defendant is an assistant vice-president of a savings and loan institution and earns a gross salary of \$15,582 per year. He receives a bonus at the end of the year in an amount set by the board of directors of the savings and loan institution. In the previous year his bonus amounted to \$1200. He is also furnished an automobile, gasoline and insurance by his employer.

The plaintiff works on a temporary, or day-by-day basis and earns \$2 to \$3 per hour depending upon the job. The nature of her employment requires her to have an automobile since she may work at a different location each day of work.

The plaintiff testified that living expenses for herself and the two children would be \$568 per month; however, if the house were furnished for her, the living expenses would be \$400 per month. The defendant testified that his living expenses totaled \$428 per month.

There is no question that the accumulated debts which the husband has been ordered to pay are substantial. The monthly payments for the first and second mortgages on the home and for a home improvement loan total over \$390. The real estate taxes on the home from the past year amount to nearly \$75 per month; and, as previously stated, the monthly car payment is \$96. There are also a number of credit accounts and two bank notes requiring payments.

The defendant cites Young v. Young, 323 Ill. 608, for the principle that the indebtedness of the husband must be considered by the court in fixing the amounts awarded in a divorce decree. We agree with this general principle; however, we do not feel that the trial court in the instant case failed to consider the indebtedness of the defendant. In Young the court was concerned with the fact that the divorce decree had ordered the husband to convey substantially all of his estate, leaving him with a portion "scarcely sufficient to pay his indebtedness." 323 Ill. at 616. The court also pointed out that there had been no allegation that the husband had an income. In the instant case the husband not only has a net income of more than \$900 per month, but also more than half of his monthly payments will be relieved upon the sale of the real property.

The defendant also points out that the husband, as well as the wife and children, must have food, shelter and other necessary living expenses and that an award of alimony should not be so high as to cause the husband personal embarrassment or financial difficulties. The defendant cites Busby v. Busby, 11 Ill.App.3d 426, 296 N.E.2d 584.

We also agree with these principles, but do not feel they require our ruling to be otherwise. The defendant in the instant case is not experiencing a lack of any necessities. As he admitted before the trial court, he purchased some \$500 worth of new clothing by use of a credit card not too long before the hearing.

The trial court had before it all of the various factors to be considered in fixing the amounts of alimony and child support and in determining who should pay the accumulated debts. See Everett v. Everett, 25 Ill.2d 342, 344, 185 N.E.2d 201; Furth v. Furth, 5 Ill.App.3d 73, 76, 283 N.E.2d 102. We do not feel that the trial court abused its discretion in either fixing the amount of alimony and child support or in ordering the defendant to pay the accumulated debts.

Nor do we feel that the trial court erred in ordering the defendant to pay plaintiff's attorney's fees of \$600. The allowance of attorney's fees in a divorce proceeding is a matter within the sound discretion of the trial court and will not be interfered with unless a clear abuse of discretion. Canady v. Canady, 30 Ill.2d 440, 446, 197 N.E.2d 42. There is no claim that the amount of the award is excessive; nor do we think that in this case such a claim would be justified. See Canady v. Canady, supra. Clearly, the plaintiff would be unable to pay the fees on her income. The defendant, although not in the best financial condition, is more able to and should bear the expense of the fees. Lauzen v. Lauzen, 81 Ill.App.2d 472, 476, 225 N.E.2d 427.

The other contention of the defendant is that the trial court erred in ordering as part of its original decree that the amounts of child support and alimony would increase after one year. In Busby, supra, the trial court in its original decree awarded alimony in the amount of \$50 per week for the first year, to be reduced to \$40 per week for the second year and \$30 per week thereafter until further order of the trial court. On appeal this was held to be error, the court pointing out that the trial court had continuing jurisdiction to modify the alimony in accordance with the changed circumstances of the parties. However, the court did not lay down a rule that a built-in adjustment clause in a divorce decree is never proper, but rather confined its ruling to the case before it.

"We, therefore, believe that under the facts of this case the reductions should not have been ordered * * * ." (Emphasis added.) 11 Ill.App.3d at 432.

In the instant case the record shows that the trial judge took into consideration a number of important factors in providing for the increases after twelve months.

By the end of that time not only should the real property of the parties have been sold, but also the defendant should have been able to pay off the car and some of the other accumulated debts. Furthermore, the plaintiff by that time would have the increased expense of renting an apartment for herself and the children. Her testimony had indicated that with the addition of having to pay rent her monthly expenses would amount to \$568. Even with the increased alimony and child support, she would still be \$168 short of the needs of the children and herself. Apparently the trial judge felt that the plaintiff could make up this deficit through her temporary employment.

In light of the various factors which the trial judge had to balance in this case, we do not feel that the trial court abused its discretion in any aspect of this case.

Judgment affirmed.

CONCUR:

Eberspacher, Jones, JJ.

PUBLISH ABSTRACT ONLY.

NO. 74-279

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED
MAY 1 - 1975*Walter T. Simmons*
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

ALAN JOE PARKS,
Defendant-Appellant.

) Appeal from the Circuit
) Court of Jackson County

) Honorable Everett Prosser,
) Judge Presiding.

Mr. JUSTICE KARNS delivered the opinion of the court:

Defendant-appellant, Alan Joe Parks, was convicted of rape after a jury trial in Jackson County and sentenced to serve from four to six years. On appeal, he alleges that the degree of the offense should be reduced and that the court erred in refusing to give certain instructions.

At about 3:00 a.m. in the morning of February 24, 1974, the prosecutrix was asleep in her apartment. She awoke when a pillow was pressed on her face. She struggled for several minutes and screamed repeatedly. Her assailant, subsequently identified as defendant, was wearing a wool cap pulled down on his face. During the struggle, she managed to remove the cap and throw it away. Defendant once attempted to strike her and scratched her face. Prosecutrix finally pushed the pillow away and said, "wait a minute, let's talk about this." Throughout the struggle, defendant lay on top of her, pinning her to the bed. At that point, defendant put his hand on the top of her full-length nightgown and asked if she wanted him to tear it from her. She responded that she would "scratch his eyes out." He then reached under the nightgown and ripped off her underpants. She testified that until this time, she thought he wanted to kill her, not rape her. Defendant continued to lay on her but was unable to complete the act of intercourse for about two and one-half hours. During this time, prosecutrix talked continuously, allegedly attempting to dissuade defendant from his purpose. She offered to fix him coffee and to meet him at

some other time for a date but for him "not to do it this way." She was pinned to the bed by defendant during this entire period and had no freedom of movement. Defendant finally told her that he would stay until he "finished whatever he was going to do." The prosecutrix then told defendant to "go ahead and get it over with and get out." She testified that she was afraid that defendant would again put the pillow over her face. Defendant achieved penetration, and the act lasted a few minutes. She then told defendant that she was sick and would vomit on him if he did not release her. Defendant moved from her and she ran into the bathroom and locked the door. After she heard him leave, she called her boyfriend and a girlfriend. She told both what had happened. Her boyfriend came to her apartment and determined that the intruder had entered through a window. Later that day, she reported the rape to her brother-in-law, a police officer. She testified that she was reluctant to report the rape because of a television program she had watched the week before outlining the trauma faced by many rape victims.

Defendant contends that the evidence did not establish that the intercourse was a product of force and that prosecutrix consented, albeit reluctantly. Thus, we need not consider the other evidence presented at trial corroborating certain aspects of prosecutrix's testimony and establishing the identity of the defendant. It should be noted, however, that the jury had before it a voluntary written statement taken from the defendant which corroborated much of the prosecutrix's testimony. The testimony of the police officers who took the statement established that defendant had in fact had intercourse with the prosecutrix. Defendant testified that he had been drinking heavily on the night of the rape and remembered very little of the offense. The facts contained in the statement given the police about the incident came from a "dream" he had about raping the complaining witness or from suggestions of the police officers. He stated that he did not know if he was in her apartment or whether he had raped her. His statement indicates that he had an argument concerning his wife earlier in the evening after which he began drinking heavily.

Defendant asserts that while force was used initially to subdue the victim, the act of intercourse consummated some two and one-half

hours later was not a product of that force. Thus, he argues, the most he could be guilty of is attempted rape or battery for the initial use of force. We disagree. Defendant notes that she at no time attempted to inflict injury upon him and that she admittedly conversed with him for two hours, culminating in her statement to "get it over with." The record before us clearly indicates that significant and terrifying force was used to subdue the prosecutrix upon defendant's entry into the apartment. She fought and screamed until defendant had her pinned to the bed with his full weight upon her. At this point, she realized that physical resistance was futile and attempted to dissuade defendant from completing the attack. The conversation related by the prosecutrix and undisputed in the record indicates that her purpose was to persuade him to leave the apartment or release her from the bed. Throughout this two and one-half hours, she was rendered immobile by defendant, evidence that her attempts at dissuasion were having no effect. Finally, defendant clearly stated to the prosecutrix that he did not intend to cease his attack. At this point, she submitted. Her explanation was that she feared that he would again put the pillow on her face. During intercourse, she devised a final, successful deception. Once released, on the pretext of nausea, she escaped to the bathroom and locked herself in until he left. She made prompt complaint of the attack to third parties and reported it to police several hours later. From the record before us, we have no doubt that the intercourse was performed by force and against the will of the prosecutrix.

The cases cited by the defendant are distinguishable on their facts. In People v. DeFrates, 33 Ill.2d 190, 210 N.E.2d 467, (1965), the defendant was known to the prosecutrix and was admitted into her home upon a pretext of repairing the air conditioning system. The prosecutrix gave defendant a drink and accompanied him to the basement. There defendant demanded that she remove her clothes. Although she objected, she complied without resistance. At defendant's urging, prosecutrix dressed again and both went to the bedroom where several acts of intercourse occurred. The prosecutrix at no time cried out or resisted. The Court rejected her contention that she was "paralyzed with fear" for the safety of children in the house.

In People v. Fryman, 4 Ill.2d 224, 122 N.E.2d 573 (1954), the attack occurred while the victim was on a date with defendant. Defendant did not deny that intercourse had occurred, but claimed that it was consensual. The Court stated the general principle that a victim in possession of her faculties must show "such resistance as demonstrates the act was against her will" but refused to substitute its judgment of the facts for that of the jury. The case was reversed on the ground that the trial court erred in refusing to submit a tendered consent instruction where evidence of consent was present. In the instant case, consent of the prosecutrix was not argued as a defense at trial. Defendant's theory was that no penetration had occurred and that the prosecutrix was inaccurate about the time of the offense. No consent instruction was tendered except as it is included as an element of the offense. There was no evidence of consent argued or proved.

In People v. Morrow, 132 Ill.App.2d 293, 270 N.E.2d 487 (1971), the victim was asleep in bed when the defendant held a knife to her throat, ripped off her pajamas and performed intercourse upon her. Afterwards, defendant remained for three and one-half hours during which several additional acts of intercourse occurred. During that time, defendant used no force or threats and the victim made no attempt to flee or dissuade her attacker. There was no evidence that defendant restrained her in any way. In addition, the two carried on a long conversation about various things, including why neither was getting his "kicks" from the acts. The victim failed to report the attack for at least thirteen hours. The court held that the State did not sufficiently prove that the acts occurred against the will of the victim. The court noted, however, that her identification of the defendant was not clear and convincing in light of his absolute denial of the acts charged and that her testimony was not corroborated. Defendant in the instant case argues that the facts in Morrow are "strikingly similar" to this case. We cannot agree. Here, defendant held the prosecutrix to the bed during the entire incident. Her one-sided conversation clearly was intended to prevent the rape from occurring. At her first opportunity she escaped and locked herself in the bathroom. Her testimony was corroborated by the evidence of immediate complaint to two third parties.

The jury had before it overwhelming evidence that defendant had intercourse with the prosecutrix by force and against her will. Defendant had ample opportunity at trial to argue and present evidence that the act was consensual. He elected instead to rely on the argument that intercourse did not occur. Both theories are refuted by the record.

Defendant next contends that the court erred in refusing to instruct the jury and submit verdict forms on attempted rape and battery. At trial, the argument was advanced that lack of penetration reduced the crime to attempt or battery. It is interesting that such an argument tacitly admits that force was used. On appeal, it is the lack of force which is offered as the mitigating factor. As noted above, however, the evidence overwhelmingly demonstrates that all elements of rape were proved. Where the evidence supports the conclusion that defendant is guilty of the substantive offense or nothing at all, it is error to give an instruction on the inchoate offense of attempt. People v. Lewis, 252 Ill. 281, 96 N.E. 1005 (1912); People v. Hatfield, 5 Ill.App.3d 996, 284 N.E.2d 708 (1972). Likewise, there was ample evidence that intercourse occurred by force and against the will of the victim and that defendant was not entitled to an instruction on battery.

The judgment of the Circuit Court of Jackson County is affirmed.

AFFIRMED.

CONCUR: JONES, P.J., G.MORAN, J.

PUBLISH ABSTRACT ONLY

FILED
MAY 1 - 1975

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

CLIFFORD C. LePERE,	:	
	:	Appeal from the Circuit Court, Twentieth
Plaintiff-Appellant,	:	Judicial Circuit of Illinois, St. Clair
	:	County.
vs.	:	
	:	
LEO B. OBERNUEFEMANN, Et al.,	:	Honorable Francis E. Maxwell,
	:	Judge Presiding.
Defendant-Appellees.	:	

MR. JUSTICE EBERSPACHER delivered the opinion of the court:

This appeal by the plaintiff, Clifford C. LePere, is from orders entered by the circuit court of St. Clair County denying the requested relief in plaintiff's amended complaint, which prayed for a declaration that county zoning ordinance was unconstitutional as applied to his property and denying plaintiff's post-decree motions.

Prior to the adoption of a zoning ordinance by St. Clair County the plaintiff applied to the County Building Code and Trailer Court Committee for a permit to construct and operate a mobile home park on 33 acres of land he owned near Dupu in Sugar Loaf Township. A permit was issued for 36 mobile home spaces. This was subsequently increased to 40 spaces. When St. Clair County adopted its first comprehensive zoning plan the plaintiff's 33 acres was zoned "Agricultural". Under this classification the 40 spaces of LePere Mobile Home Village became non-conforming uses.

In April, 1973, the plaintiff took steps to further develop his 33 acres. The plaintiff sought to have his entire 33 acre tract zoned "MR-2", multi-family residence. He also sought a special permit to allow further mobile home development. The plaintiff's proposed development included plans for the addition of 94 trailer units. Pursuant to these requests a hearing was conducted by ^{the} St. Clair County Zoning Board of Appeals.

After the public hearing the Board of Appeals took the matter under advisement. At the Board's meeting on May 25, 1973, the Board voted to deny the plaintiff's petition. Their recommendation to deny the plaintiff's petition was forwarded to the County Board by way of memoranda issued May 29, 1973. On the same day, May 29, 1973, the County Board passed two resolutions denying plaintiff's petition. One resolution denied the

plaintiff's request for a zoning amendment to change the zone classification of the plaintiff's 33 acre tract. The second resolution denied plaintiff's request for a special permit which would have permitted the addition of 94 units to the plaintiff's mobile home park.

The plaintiff filed a complaint for "judicial review" of the County Board's decision. The plaintiff subsequently amended this complaint to one seeking a declaratory judgment that the County Board's resolutions and the St. Clair County Zoning Ordinance be declared unconstitutional in their application to his 33 acre tract. The trial court made the following findings,

"Court finds that there is a presumption of validity of the action, and that petitioner has burden of proof to show by clear and convincing evidence that the zoning ordinance and action is, as to him, arbitrary and unreasonable and without substantial relation to the public health, safety or welfare. Court finds from the evidence that the ordinance and action taken do have a substantial and reasonable relation to the public welfare and safety, and therefore denies the prayer of the complaint for declaratory judgment, and affirms the action of the various boards and bodies involved, in denying the classification change and in denying the granting of a special permit."

The plaintiff then filed a "post-decree and judgment" motion, wherein he alleged the following grounds for reversal,

"1. There is no evidence in this cause to support the finding that the Ordinance and action taken have a substantial and reasonable relation to the public welfare and safety.

2. There is ample evidence that plaintiff has shown by clear and convincing evidence that the Zoning Ordinance and action is as to him arbitrary and unreasonable and without substantial relation to the public health, safety or welfare.

3. The findings in the Order are contrary to the law governing this case.

4. That the findings in this Order are clearly contrary to the manifest weight of the evidence."

The trial court denied plaintiff's "post-decree" motion. This appeal followed.

After filing a brief with this Court the plaintiff, in a letter directed to the clerk of this Court, requested that certain corrections be made to his brief pursuant to Supreme Court Rule 361(f). The primary thrust of this letter was to strike his first argument, which concerned the unconstitutionality of the St. Clair County Zoning Ordinance as it applied to his land. The letter includes the following provision,

"Appellant hereby waives all issues made on appeal and all Points and Authorities and Argument previously presented within the matter and material stricken."

A copy of this letter was served upon the appellee.

The sole remaining issue plaintiff raises in his appellate brief is that the "action of the Zoning Board of Appeals and the County Board of Supervisors constitutes a deprivation of plaintiff's property without procedural due process of the law." (Emphasis Added.) In this argument the plaintiff attacks the manner in which the relief he requested was denied. This issue was not raised in plaintiff's amended complaint, in his trial brief, or in his post-trial motion. In view of the plaintiff's failure to present this argument in the trial court we will not entertain such argument for the first time on appeal. See, City of Chicago v. Birnbaum, 49 Ill.2d 250, 273 N.E.2d 22. And, since the plaintiff has abandoned all of the issues he raised in the trial court, we are left with nothing to decide. We, therefore, have no recourse but to dismiss this appeal.

Appeal Dismissed.

JONES, P.J., and MORAN, J., concur.

PUBLISH ABSTRACT ONLY

3D
281.A. 345

NO. 73-399

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED
MAY 6 - 1975

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Bond County
Plaintiff-Appellee,)	
)	
v.)	
)	
KENNETH R. CHILDERSON,	)	Honorable Joseph J. Barr,
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. JUSTICE KARNS delivered the opinion of the court:

This is an appeal from the judgment of the Circuit Court of Bond County finding defendant-appellant guilty of the offense of improper backing (Ill.Rev.Stat. 1973, ch. 95-1/2, sec. 11-1402) and imposing a fine of \$250.00, plus costs, Ill.Rev.Stat. 1973, ch. 95-1/2, sec. 6-601. The defendant appeared pro se and the case was tried before the court sitting without a jury.

The appellant, pro se, contends that his fourteenth amendment rights of due process and equal protection were violated by (1) the trial court's setting the trial date on August 2, 1973, rather than July 30, 1973, the date of his arraignment when he expressed a desire to have the cause tried, and (2) by his being required to testify under oath. The appellant also contends that the fine of \$250.00 was excessive, and therefore violative of the eighth amendment prohibition against cruel and unusual punishment.

The defendant and John Paul Williams were involved in an automobile collision on May 26, 1973, in Smithboro, Illinois. The defendant was issued a traffic citation for improper backing and John Williams was issued a citation for improper lane useage. John Williams entered a plea of guilty and paid the fine imposed. On June 11, 1973, the defendant appeared in court and requested a continuance. The case was continued to July 30, 1973, at which time the defendant entered a plea of not guilty and waived his right to jury trial. The cause was set for trial in August, 1973.

At trial the State introduced testimony of Illinois State Policeman Dale Smith who investigated the accident and issued traffic

citations. Testimony also was heard from John Williams and Lula Dwyer, who witnessed the accident. All testified that the defendant had improperly backed his pick-up truck into John Williams' automobile. The defendant cross-examined each witness and testified in his own behalf. The trial court found the defendant guilty of improper backing and imposed a fine of \$250.00. The defendant, pro se, appeals from that judgment.

We note at the outset that every individual has a constitutional right to represent himself. Nevertheless, when acting as his own attorney one is still obliged to adhere to the judicial rules of appellate procedure, Ill.Rev.Stat. 1973, ch. 110A, pars .1 et seq. In an attempt to give the appellant an opportunity to present his cause before this Court, we have refrained from dismissing his appeal for failure to conform to the Supreme Court Rules and have extended every benefit to the appellant because of lack of knowledge of appellate procedure.

The issues raised by the appellant, we believe, are without merit. However, we have reviewed the entire record and find that the judgment of the trial court and the evidence presented was not so unsatisfactory as to leave any reasonable doubt as to the defendant's guilt. We will not disturb a judgment finding defendant guilty on grounds of insufficient evidence unless it is so unsatisfactory, improbable or unreasonable and so palpably contrary to the evidence as to justify the court in entertaining a reasonable doubt of the defendant's guilt. People v. Rogers, 132 Ill.App.2d 501, 270 N.E.2d 186 (1971); People v. Hill, 61 Ill.App.2d 16, 208 N.E.2d 874 (1965). The fine imposed was well within the statutory limits and therefore not so excessive as to constitute cruel and unusual punishment. People v. Curtin, 44 Ill.2d 507, 255 N.E.2d 916 (1970).

The judgment of the Circuit Court of Bond County is affirmed.
AFFIRMED.

CONCUR: JONES, P.J., CARTER, J.

PUBLISH ABSTRACT ONLY

28 I.A. 3D 511
FILED

28 I.A. 3D 468

74-365 Cons.
74-366 Cases

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
Honorable WALTER DIXON, Justice
Honorable THOMAS J. MORAN, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 15, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

281.A. 511

FILED

MAY 16 1975

LOREN J. STROIE, Clerk
Appellate Court, 2nd District

No. 74-365
74-366 (Cons.)

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.) Appeal from the Circuit
) Court of Stephenson County,
JAMES J. JURY,) Illinois.
)
Defendant-Appellant.)

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Defendant appeals concurring sentences of 1 to 3 years to the Department of Corrections on a negotiated plea of guilty to an indictment (No. 74 C 328) for robbery on May 17, 1974, and to an indictment (No. 74 C 341) for robbery on April 28, 1974. Under the negotiated plea the charge of aggravated battery against defendant in Case No. 74 C 328 was dismissed and the State recommended (and the court imposed) the minimum penalty in No. 74 C 328 to be served concurrently with the identical sentence imposed in No. 74 C 341. (For convenience this opinion will cover both appeals.)

After defendant filed his notices of appeal in both cases and requested appointment of counsel the trial court appointed the office of the State Appellate Defender to represent him. Appellate Counsel has filed his motion in each case requesting permission to withdraw for the reason that the appeal is entirely without merit,

together with his brief, a copy of which has been furnished to defendant. Defendant was properly notified of both motions and time was allowed him to raise any points that he might choose in his behalf. The time allowed has passed and defendant has not presented any objections, comments or other response with respect thereto.

We have made a full examination of all the proceedings in both cases from the date the criminal complaints were filed in the circuit court of Stephenson County on May 22, 1974, in case No. 74 C 328 and on May 27, 1974, in case No. 74 C 341. On those respective dates defendant appeared before the court and was advised of his various rights upon arrest. On June 5 the Grand Jury indicted the defendant along with Richard Gravenstein in case No. 74 C 328. They were charged in Count I with the offense of robbery in that they took a man's wallet and \$4 United States currency from the person of Irl McNutt by the use of force; and in Count II with aggravated battery committed against Irl McNutt. On the same day the Grand Jury returned an indictment in case No. 74 C 341. In that indictment defendant, along with Roger Wilson, was charged with the offense of robbery in that they and each of them did take property consisting of \$60 United States currency from the presence of Georgia [Georgina] Tessendorf by threatening the imminent use of force.

At his arraignment on June 19 defendant appeared with his appointed counsel, the Public Defender. The court determined that the defendant's age was 22, and after the court read and explained the indictments to the defendant, the defendant indicated he understood the nature of the charges in both cases and entered pleas of not guilty and requested a jury trial in each case. The

Nos. 74 365-366

-3-

judge thereupon scheduled case No. 74 C 328 for trial on July 22 and case No. 74 C 341 for trial on August 15.

Both cases then came on for hearing on July 1 before another judge. Defendant appeared in person and was represented by his appointed counsel who stated that defendant appeared to withdraw his plea of not guilty in each of the cases pursuant to plea negotiations. The court determined the defendant's age, that he had a high school education and had no physical or mental disabilities. The court read the counts in each case to which the defendant pleaded guilty. The defendant indicated that he understood the nature of each of the charges. The court then explained in detail the various consequences of the guilty pleas, the minimum and maximum sentences, including the mandatory parole period, the application of the one-third rule and the possibility of the maximum fines, or both fines and imprisonment. Defendant indicated his understanding of the consequences.

In short, in both cases the court explained the defendant's right to a jury trial, his right to confront witnesses, his right against self-incrimination, his right to subpoena witnesses to testify in his behalf, and to cross-examine the State's witnesses. In each case the defendant indicated his understanding and waiver of those rights. The court also determined that no threats had been made to induce the change of pleas in both cases and the prosecutor narrated the terms of the negotiation, including his recommendation. Defendant's appointed counsel stated that they were correct statements of the agreement and defendant concurred.

After the prosecutor stated the facts establishing the basis for the robbery charge in No. 74 C 328 the defendant acknowledged the facts as stated but corrected those facts by stating that it was \$2, not \$4, which was the sum taken. The court then accepted the guilty plea in No. 74 C 328, defendant's counsel

having waived the right to a pre-sentence report and the court proceeded to conduct the sentencing hearing. During that hearing defendant stated his regrets for his action and the lack of any explanation except his "stupidity". The court also determined that the defendant was competent, then approved the recommended plea negotiation, and entered judgment on the plea negotiations in No. 74 C 328 and informed defendant of his right to appeal. Subsequently, the defendant filed notice of appeal and the trial judge appointed the office of the State Appellate Defender to represent him.

In Case No. 74 C 341 substantially the same action took place, except that after the prosecution narrated the factual basis for that offense, defendant in acknowledging those facts stated that he did not have the weapon. The 1 to 3 year sentence imposed was ordered to be served concurrently with the sentence imposed in No. 74 C 328.

From our examination of the record in both cases we conclude that (1) the indictments sufficiently charged an offense in each case; (2) the trial court substantially complied with each and every requirement of Supreme Court Rule 402 (Ill. Rev. Stat. 1973, ch. 110A, par. 402); (3) the sentence is not excessive; and (4) the defendant, being represented by court appointed counsel, was properly advised by the trial court that he could waive pre-sentence investigation and written report, particularly in view of the fact that defendant, having received the recommended sentence, was not prejudiced because of lack of pre-sentence report.

In view of the foregoing both of defendant's appeals are without merit and the office of the State Appellate Defender is given leave to withdraw and the judgments of the trial court are affirmed.

Motions to withdraw granted and judgments affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

FILED

MAY 1 - 1975

NO. 74-391

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Franklin County
Plaintiff-Appellee,)	
)	
v.)	
)	
ALLEN W. MILLER,	)	Honorable F. P. Hanagan,
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. JUSTICE CARTER delivered the opinion of the court:

After a hearing, the Circuit Court of Franklin County revoked the probation of the defendant-appellant, Allen W. Miller, and ordered him to serve a term of eleven months at the Illinois State Penal Farm at Vandalia. The defendant appeals from this order and also alleges errors committed in the underlying plea proceedings at the close of which the court had placed the defendant on probation.

The defendant was arrested on November 17, 1973, in Franklin County and charged with unlawful use of weapons and reckless driving. On November 19, 1973, the defendant, pursuant to a plea agreement, pled guilty and was sentenced to a term of probation on the weapons charge. The court also fined him \$1,000.00 (\$950.00 on the weapons charge, \$50.00 for reckless driving).

Thereafter on April 22, 1974, a petition to revoke probation was filed and the defendant was arrested. The defendant appeared at the revocation hearing on August 8, 1974.

The defendant asserts as error certain defects in his original plea proceedings. Alleged defects in the original plea proceeding may not be raised on appeal from an order revoking probation, since such an allegation amounts to a collateral attack of the earlier judgment. People v. Fleming, 23 Ill.App.3d 221, 318 N.E.2d 518; People v. Floyd, 14 Ill.App.3d 1009, 303 N.E.2d 826. The instant case is not, and has not been consolidated with a direct appeal from the original convictions of unlawful use of weapons and reckless driving. The attempt to raise issues which might have been raised in a direct appeal constitutes a collateral attack of the original conviction

and is outside the scope of this appeal. Accordingly, we find that this contention is not properly before us.

The appellant's second and final contention is that the circuit court imposed an excessive sentence.

When a defendant who has been convicted for an offense is admitted to probation, and the probation is subsequently revoked, the court may impose any sentence which would have been appropriate to the original offense. People v. Bullion, 21 Ill.App.3d 297, 314 N.E.2d 731. For the instant offense, a Class A misdemeanor, any sentence of incarceration of less than one year may be imposed. Ill.Rev.Stat. 1973, ch. 38, §24-1 and 1005-8-3(a)(1). Unlike the 17-year-old youths in the cases cited by the appellant (People v. Hudson, 3 Ill.App.3d 815, 279 N.E.2d 120; People v. Daniels, 3 Ill.App.3d 812, 279 N.E.2d 121, the defendant in the present case was a 34-year-old man at the time of sentencing. He had pled guilty to reckless driving and to carrying illegally two hand guns in his car. During the sentencing hearing on the probation revocation, the judge determined that a sentence other than incarceration would deprecate the seriousness of the offense. The court recognized that time served on probation would be credited toward the sentence imposed on revocation, and that sentence of 11 months would result in approximately six months' actual incarceration. Because the sentence imposed was within statutory limits, we conclude that the circuit court did not abuse its discretion in sentencing the defendant.

The adequacy of the grounds for revocation of probation having not been contested on appeal, we affirm the order of the circuit court of Franklin County revoking probation and imposing sentence.

Judgment affirmed.

CONCUR: EBERSPACHER, KARNS, JJ.

3D
281.A. 571

12614

(24540-4M-9.70) 160-0

STATE OF ILLINOIS

APPELLATE COURT

AT AN APPELLATE COURT, for the Fourth Judicial District of the
State of Illinois, sitting at Springfield:

PRESENT

HONORABLE LELAND SIMKINS, Presiding Judge

HONORABLE FREDERICK S. GREEN, Judge

HONORABLE HAROLD F. TRAPP, Judge

Attest: ROBERT L. CONN, Clerk.

BE IT REMEMBERED, that to-wit: On the 22nd day
of May A. D. 1975, there was filed in the office of
the Clerk of the Court an opinion of said Court, in words and figures
following:

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12614

Agenda No. 75-7

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee	)	Appeal from
	)	Circuit Court
v.	)	Livingston County
	)	74-CF-24
JOHN SPIRES,)	
)	
Defendant-Appellant)	

Mr. JUSTICE GREEN delivered the opinion of the court:

On April 1, 1974, after plea negotiations, defendant John Spires entered a plea of guilty before the Circuit Court of Livingston County to a charge of aggravated battery alleged to have occurred March 5, 1974. Judgment was entered on the plea, and he was sentenced to a term of 1 to 3 years. He appeals from that judgment contending that the court, in accepting his plea, erred in failing to admonish him of the minimum and maximum sentences provided by law for the offense to which he pleaded and to advise him that by pleading guilty, he waived his right to trial and to confront witnesses.

The plea was to the type of aggravated battery defined by Section 12-4(b)(6) of the Criminal Code (Ill.Rev.Stat. 1973, ch. 38, par. 12-4(b)(6) as a battery upon a person known by the assailant to be a police officer engaged in his official duties. Prior to January 1, 1973 Section 12-4 provided in part:

"(b) A person who, in committing a battery either:

* * *

(6) Knows the individual harmed to be a peace

officer, or a person summoned and directed by him, or a correctional officer, while such officer is engaged in the execution of any of his official duties including arrest or attempted arrest;

* * *

(9) . . . commits aggravated battery and shall be imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to 5 years."

Subsections (a) and (c) which define other types of aggravated battery also had separate provisions for penalty.

On January 1, 1973, the Unified Code of Corrections (Ill. Rev.Stat. 1973, ch. 38, par. 1001-1-1 et seq.) took effect. Section 5-8-1 of that code provided for a classification of offenses for the purpose of sentencing (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1). Also effective on January 1, 1973 was P.A. 77-2638, which purported to amend the Criminal Code to classify each of the substantive offenses defined therein according to the sentencing classification system of the Unified Code of Corrections. The amendments added a new subsection to Section 12-4 of the Criminal Code which stated: "(d) Sentence. Aggravated battery is a Class 3 felony." The sentence of imprisonment for a Class 3 felony is 1 to 10 years (Ill.Rev.Stat. 1973, ch. 38, par. 1005-8-1). The amendment deleted the penal provisions from subsections (a) and (c) but failed to delete the penal provision from subsection (b).

In the case under consideration, prior to the court's acceptance of a waiver of indictment and the plea of guilty from the defendant, the judge admonished him as to the possible punishment in the following words:

"Upon conviction of aggravated battery you could be sentenced to a term in the penitentiary of not less than one nor more than ten years. You are subject to a term of probation or a conditional discharge not to exceed five years or a fine up to \$10,000 or a sentence of periodic imprisonment not less than one year nor more than ten years either alone or as a condition of probation or a conditional discharge.

Do you have any question at all about the penalty upon conviction?"

If subsection (d) determined the sentence that could be imposed, every aspect of the admonition except that concerning periodic imprisonment was correct. If subsection (b)(9) controlled, the admonition was totally incorrect. We need not determine what the applicable penalty in this case was, however, because under the ruling in People v. Krantz, 58 Ill. 2d 187, 317 N.E.2d 559 only substantial compliance with Supreme Court Rule 402a (Ill.Rev.Stat.1973, ch. 110A, par. 402) is required to support the acceptance of a guilty plea on appeal. Such compliance existed in Krantz where a generally complete admonition failed to tell defendant Barr the maximum and minimum sentence that could be imposed. The plea of guilty was obtained pursuant to negotiations and Barr received the sentence stated in the plea agreement. In attacking his conviction Barr did not allege that he was unaware of the possible punishment, that he was prejudiced by the failure to advise him of it, or that he would not have so pleaded had he known of the possible sentence (see also People v. Warship, 59 Ill.2d 125, 319 N.E.2d 507). Here the defendant also made no such allegations and he, too, received



the sentence stated in the plea agreement. Substantial compliance with Rule 402a does not require admonition in regard to periodic imprisonment, probation or conditional discharge (Krantz supra; People v. Butchek, 22 Ill.App.3d 391, 317 N.E.2d 148; People v. Wills, 23 Ill.App.3d 25, 319 N.E.2d 269). Thus even if defendant's claim that Section 12-4(b)(9) of the Criminal Code set forth the applicable penalty were correct, there was no reversible error in any inaccuracies in the admonition as to the penalty.

Prior to accepting the plea, the trial judge advised the defendant extensively about his various constitutional rights but did not tell the defendant that if he pleaded guilty, he would be waiving his rights to trial of any kind and to confront the witnesses against himself. The admonition ended with the judge asking the defendant if he had any questions and the defendant answered, "no". Defendant asks that the conviction be reversed because of the failure of the court to advise him as to the waiver of these rights.

Defendant calls our attention to People v. Rambo, 123 Ill. App.2d 299, 260 N.E.2d 119, where a minor defendant was convicted of murder in a bench trial. Prior to the trial the court advised that defendant of his right of trial by jury but did not tell the defendant that he was waiving that right if he had a bench trial. The defendant signed a jury waiver but it was not shown that he read it. The conviction was reversed. Subsequently, however, in People v. Shepard, 10 Ill.App.3d 739, 295 N.E.2d 310 and People v. Campbell, 13 Ill.App.3d 237, 300 N.E.2d 568, convictions on

guilty pleas were affirmed where the court advised the accused of these rights but did not tell them that they would waive these rights by entering pleas of guilty.

In People v. Reeves, 51 Ill.2d 28, 276 N.E.2d 318, a plea of guilty was accepted from a defendant without admonition by the court that such a plea waived the right of confrontation and the privilege against self-incrimination. On appeal, the conviction was affirmed, the court stating that the record affirmatively showed that the plea was entered voluntarily and understandingly and that Boykin v. Alabama, 395 U.S. 243, 23 L.Ed.2d 274, 89 S.Ct. 1709, requires nothing more.

Similarly in the instant case there is no question but that the plea was voluntary. The record indicates a thorough admonition which when taken with the answers given by the defendant show conclusively that the defendant knew that if he pleaded guilty, he would have no trial and no chance to confront the witnesses against him. There was, thus, no reversible error in this aspect of the admonition either.

The judgment appealed from is affirmed.

AFFIRMED.

SIMKINS, P.J., and TRAPP, J., concur.



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73-450

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On May 23, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

75
FILED

MAY 23 1973

No. 73-450

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

Abstract

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit
	)	Court for the Sixteenth
v.	)	Judicial Circuit, Kane
	)	County, Illinois.
GEORGE McLELLAN,)	
)	
Defendant-Appellant.)	

MR. PRESIDING JUSTICE SEIDENFELD delivered the opinion of the court.

On September 8, 1972, defendant was convicted of burglary upon his plea of guilty to the information charging the offense, and sentenced to 1-3 years in the penitentiary. Notice of appeal was not filed until August 31, 1973.

Appointed counsel filed a brief in which he contended, inter alia, that when he waived indictment defendant was not properly admonished pursuant to Supreme Court Rule 401(b) (Ill.Rev.Stat. 1971, ch. 110A, par. 401(b)); and further contended that the court's inquiry as to the nature of the charge and the factual basis for the plea was not in substantial compliance with Supreme Court Rules 402(a), 402(c) (Ill.Rev.Stat. 1971, ch. 110A, pars. 402(a), 402(c)). The People in an answering brief first moved to dismiss the appeal for want of jurisdiction because of the untimely filing of the notice of appeal and, in the alternative, responded on the merits.

Thereafter, appointed counsel sought and was granted leave here to withdraw defendant's brief upon his concession of lack of jurisdiction. He has moved to withdraw as counsel pursuant to Anders v. California (1967), 386 U.S. 738 and People v. Jones (1967), 38 Ill.2d 384. Defendant has been notified that he could file a pro se brief but has not done so.

We have reviewed the record together with counsel's motion and the authorities cited. We grant the motion to withdraw and dismiss the appeal.

Under Supreme Court Rule 606(a), the filing of the notice of appeal is jurisdictional (Ill.Rev.Stat. 1973, ch. 110A, par. 606(a)). There is no express provision permitting the filing of a notice of appeal more than six months after the expiration of the time provided in Supreme Court Rule 606(b), (c) (Ill.Rev. Stat. 1973, ch. 110A, par. 606(b), (c)). Under the statute in force at the time of defendant's guilty plea (Ill.Rev.Stat. 1973, ch. 110A, par. 606) the court was under no duty to advise defendant of his right to file an appeal. The record discloses no argument based on fundamental fairness which would excuse defendant's delay and his counsel has stated that there is none. Compare People v. Williams (1974), 59 Ill.2d 243.

Motion to withdraw allowed, appeal dismissed.

GUILD, J. and HALLETT, J. concur.

The incident occurred on a summer night between 8:30 and 9:00. Kristine Rizzo, 6 years of age, and her sister Pamela, then 8 years old, were crossing the street. Pamela testified that she arrived near the middle of the street and stopped because she heard a car; then she saw Kristine running in front of her across the street. The car came "in front of" Pamela, then got out of her way, and she ran home. Kristine ran when they were about one fourth of the way from the curb, and when Pamela reached the middle of the street she told Kristine to stop "and she wouldn't."

Salvatore Rizzo, a brother 9 years old at the time, testified that the girls started walking across the street, but Kristine, who was in front, started running when she was at the second lane from the curb. When she was in the third lane, going west, the car hit her. Lynn Malone, 12 years old, testified that she saw three girls running across the street and "when Krissy ran" she heard a screech, and Krissy was hit. Jane Zei, 8 years old at the time of the incident, testified she also saw the girls running. Park Ridge Police Officer Leroy Schwarz testified that he responded within a few minutes and found the child underneath the car just about even with the driver's side door, her head facing the center lane. The left front bumper and headlight of the car had struck her. He was not sure if the defendant's headlights were on when he arrived, but a police photograph admitted in evidence showed that they were on. He measured 20 feet, 4 inches of skid marks.

Defendant testified, both as an adverse witness under section 60 (Ill.Rev.Stat. 1973, ch.110, par. 60) and in his own behalf, that he was driving on Northwest Highway at a speed of 20 to 22 miles an hour when he saw something off to his left, "a light object." He swerved immediately, hit his brakes hard, and was going toward the right side when he hit the girl. He then saw another girl but did not see the one he struck at all, until after the occurrence. He was about a car length away when he first saw the "form"; he was braking, and the front of his car dipped from the application of the brakes; and he estimated that he was traveling at about 17 or 18 miles an hour at the time of impact which took place on the left front corner of the car. He did have his lights on.

Michael Devency, then 18 years of age, was a few hundred feet away watching a softball game when he saw the two girls walking. and when they were near the street they started running. The older child was

crossing and the car swerved to the left to miss her and hit the smaller child. The car dipped and swerved before the impact; it had braked and was stopping at impact, and the child slid under the car which stopped after the impact.

Plaintiff first contends that the trial court should have directed a verdict in her favor on the issue of liability or, in the alternative, that the jury's verdict is against the manifest weight of the evidence. Only if the evidence viewed in its aspect most favorable to the defendant so overwhelmingly favors the plaintiff that no contrary verdict could ever stand, may a verdict be directed or judgment notwithstanding the verdict be entered for the plaintiff. (Pedrick v. Peoria & Eastern R.R. Co. (1967), 37 Ill. 2d 494, 509-510, 229 N.E. 2d 504.) It has often been said that whether one is guilty of negligence is preeminently a question of fact for the jury, and the jury's determination will be set aside only when it is clear that it is against the manifest weight of the evidence. Kahn v. James Burton Co. (1955), 5 Ill.2d 614, 623, 126 N.E. 2d 836.

The evidence here was conflicting. Plaintiff's theory was that defendant was negligent either because he was speeding or failed to yield the right-of-way or exercise a proper lookout, or failed to warn the pedestrian of his approach. However, there was evidence from which the jury could have found that defendant did keep a proper lookout; that he was not speeding; and that he did not negligently fail to yield the right-of-way or warn the child with whom his vehicle collided. Defendant testified that he applied his brakes as soon as he saw the older child and was able to swerve and avoid hitting her. The jury could have concluded that the younger child unexpectedly ran out in front of defendant's vehicle at a point where defendant, without negligence, was no longer able to stop in time to avoid the collision. The jury's verdict was not against the manifest weight of the evidence, and the trial court did not err in refusing to direct a verdict for the

plaintiff. Hall v. Randell (1975), _____ Ill.App. 3d _____,
 _____ N.E.2d _____, No. 58003.

In the course of his argument that the verdict was against the manifest weight of the evidence, plaintiff contends that two photographs of the deceased child should have been admitted into evidence to show the speed of the defendant's vehicle. We have examined these photographs which are gruesome in nature. There was other substantive evidence of the defendant's speed, and even if the photographs had been admitted for that limited purpose it still would have been within the discretion of the trial court whether they should have gone to the jury. (See Sparling v. Peabody Coal Co. (1974), 59 Ill.2d 491,501, _____ N.E.2d _____.) The trial court therefore did not err in refusing to admit the photographs.

Finally, plaintiff contends that certain actions of counsel for defendant during the trial were improper and constituted prejudicial conduct which denied him a fair trial. Plaintiff complains that in examining defendant during direct examination, defendant's counsel improperly suggested—in the form of a question put to defendant—that the accident was "a highly traumatic experience" in his life. Plaintiff objected, and the trial court sustained the objection. Any prejudice to plaintiff's case from this remark was minimal, since under examination by plaintiff's counsel the Park Ridge police officer testified that he took defendant to the hospital for treatment of shock.

Plaintiff also complains that the court improperly allowed defendant's counsel to argue to the jury that the incident in question was "an unavoidable accident." The argument was proper, and similar language may be found in decisions of the Illinois Supreme Court. (See Morrison v. Flowers (1923), 308 Ill.189,197; Illinois Pattern Jury Instructions, Civil, 12.03.) Plaintiff received a fair trial, and the jury's verdict was not against the manifest weight of the evidence. The judgment of the circuit court is affirmed.

Affirmed.

Bar Allen
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No. 60581

JOSEPH A. THORSEN REALTORS,)
) APPEAL FROM THE CIRCUIT
Plaintiff-Appellant,)
) COURT OF COOK COUNTY.
v.)
) HONORABLE
JOHN WERNER,) ANTHONY MONTELLONE,
) PRESIDING.
Defendant-Appellee.)

Before DEMPSEY, McNAMARA and MEJDA, JJ.

PER CURIAM:

Plaintiff appeals from an order of the circuit court of Cook County granting defendant's petition under section 72 of the Civil Practice Act (Ill.Rev.Stat. 1973, ch.110, par.72) to vacate a judgment against defendant in a suit for property damage.

On June 1, 1973, plaintiff filed suit against defendant, John Werner, and Roland Massey to recover for damages caused to plaintiff's property. On January 22, 1974, after a bench trial, judgment was entered in favor of plaintiff against defendant, John Werner, in the sum of \$425, plus costs. A judgment was also entered in favor of co-defendant Roland Massey. More than 30 days after the rendition of the judgment, defendant filed a petition to vacate under section 72 of the Civil Practice Act (Ill.Rev.Stat. 1973, ch.110, par.72). Subsequently, an amended petition was filed. The amended petition, supported by affidavit of defense counsel, alleged that at all times defendant was a minor and that no guardian ad litem was appointed to represent him. A copy of the defendant's birth certificate showing that he was a minor was attached to the petition. The petition also set forth that defendant had a meritorious defense to the cause of action. The trial court granted defendant's petition to vacate and plaintiff appeals.

Plaintiff's first contention on appeal is that there was no valid evidence to establish that defendant was a minor. Plaintiff argues that defense counsel's affidavit, made under oath and attached to the petition, stated that the facts set forth were true and correct to the best of his knowledge and belief and coupled with the fact that the birth certificate was not certified



or exemplified demonstrates that there was insufficient evidence to prove that defendant was a minor. Where a petition made under section 72 is supported by affidavit and the opposing party does not file counter affidavits or a motion to strike the affidavit, the statements contained in the affidavit must be taken as true. (Rossten v. Wolf (1957), 14 Ill.App.2d 322, 144 N.E.2d 757; C. Chicoine v. John Marshall Bldg. Corp. (1966), 77 Ill.App.2d 437, 222 N.E.2d 712.) In the case at bar, plaintiff in the trial court did not file a counter affidavit or make a motion to strike the affidavit. Therefore, all allegations in defendant's affidavit must be taken as true. Under these circumstances the trial judge was justified in finding that at the time of the action defendant was a minor.

The law is well settled that a minor can only appear to defend a lawsuit by a guardian ad litem and not in person or through an attorney. (Peak v. Shasted (1859), 21 Ill. 137, 74 A.D. 83.) Where the defendant is a minor, it is the duty of the court on application of the plaintiff to have a guardian appointed. A judgment entered against a minor without the appointment of a guardian ad litem to represent him in the suit is voidable and may be set aside by a proper motion made in the court where the judgment was rendered. (Simpson v. Anderson (1922), 305 Ill. 172, 137 N.E. 88; McCarthy v. Cain (1922), 301 Ill. 534, 134 N.E. 62; Thurston v. Tubbs (1911), 250 Ill. 540, 95 N.E. 479; Ridenour v. Johns (1930), 258 Ill.App. 48.) A petition under section 72 of the Civil Practice Act is the proper method to attack such a judgment where more than 30 days has elapsed since its rendition. Chmielewski v. Marich (1953), 350 Ill.App. 379, 113 N.E.2d 69.

Plaintiff argues that defendant took unfair advantage of his opponent by failing to bring his minority to its attention at the time of the trial. However, as admitted by plaintiff in its brief, there is no way to determine when defendant's counsel first became aware of defendant's minority. There also is nothing in the record to indicate that defendant himself was aware of the

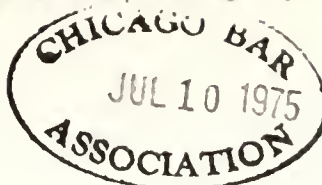
effect of his minority at the time of the trial. The law, as previously stated, is clear that a judgment entered against a minor without the appointment of a guardian ad litem is voidable and may be set aside by proper motion. Defendant's petition under section 72 of the Civil Practice Act established that at the time of trial he was a minor and that no guardian ad litem was appointed to represent him. The judgment entered against defendant was properly vacated.

In view of our holding, it is unnecessary to consider defendant's contention that the appeal should be dismissed because plaintiff has furnished an inadequate record. However, we must comment on defendant's additional argument that the appeal should be dismissed because all matters have been rendered moot by payment of the judgment.

It is well settled that the payment or satisfaction of a money judgment by a judgment debtor does not bar the prosecution of an appeal. (Pinkstaff v. Penn. R.R. Co. (1964), 31 Ill.2d 518, 202 N.E.2d 512.) Similarly, the payment of a judgment after it was rendered does not bar an appeal from the allowance of a section 72 petition.

Accordingly, the order of the circuit court of Cook County granting defendant's petition under section 72 of the Civil Practice Act is affirmed.

Order affirmed.



61103

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	COOK COUNTY
)	
v.)	
)	
ROBERT DAVIS, otherwise called)	
TERRANCE SCOTT,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	President.

PER CURIAM.

Before McGLOON, P.J., DEMPSEY, J., and MEJDA, J.

Robert Davis, otherwise called Terrance Scott, defendant, was charged with the crime of attempted armed robbery (Ill. Rev. Stat. 1973, ch. 38, par. 8-4). He entered a negotiated plea of guilty and was sentenced to a term of one to two years, to be served concurrently with an identical sentence imposed upon a violation of a previous probation on a separate offense. Defendant appeals, arguing that in accepting his plea of guilty the trial judge failed to comply with Supreme Court Rule 402(b) (Ill. Rev. Stat. 1973, ch. 110A, par. 402(b)).

The record reflects that when defendant's case was called for trial on March 25, 1974, defense counsel requested a pretrial conference. After the conference was held, defense counsel stated in defendant's presence that defendant wished to withdraw his previously entered plea of not guilty and enter a plea of guilty to the charge of attempted armed robbery. The trial judge advised defendant that by entering a plea of guilty he would waive his constitutional right to have a jury of 12 people to determine his guilt or innocence and his right to have a bench trial at which a trial judge would determine his guilt or innocence. Defendant was informed that at any trial he would be presumed innocent, have the right to confront the witnesses against him and have the right not to incriminate himself. He was advised of the possible statutory penalty for the crime of attempted

armed robbery. The trial judge informed defendant that upon a plea of guilty he would sentence the defendant to a term of one to two years. The judge stated that he was satisfied there was a factual basis for the plea of guilty. Defendant persisted in his plea of guilty which was accepted by the trial judge.

Defendant's first contention is that the trial court, in accepting his plea of guilty, failed to comply with Supreme Court Rule 402(b) by failure to confirm the terms of the plea agreement by questioning defendant personally in open court. Rule 402 requires only substantial compliance with its terms. (People v. Mendoza (1971), 48 Ill. 2d 371, 270 N.E. 2d 30.) Here the record shows that after the pretrial conference the trial judge informed defendant that upon a plea of guilty he would impose a sentence of one to two years. Defendant stated that he understood. This statement by the trial judge is sufficient to constitute substantial compliance with Supreme Court Rule 402(b).

Even if we accepted defendant's argument that the trial judge's statement was insufficient to comply with Supreme Court Rule 402(b), a reversal is not warranted. In People v. Dudley (1974), 58 Ill. 2d 57, 316 N.E. 2d 773, the defendant was convicted upon his negotiated plea of guilty to the crime of attempted rape. On appeal he argued that the trial judge failed to comply with Supreme Court Rule 402(b) in that the terms of the plea agreement were not stated in open court. The Supreme Court held that the failure of the trial court to state the terms of the plea agreement in open court did not constitute reversible error. The court said at page 60:

"It does not follow, however, that the failure to comply with these provisions of Rule 402(b) must result in a reversal of the judgment of conviction. There is no claim that the plea of the defendant, who was represented by counsel, was not voluntary. There is no other claim of harm or prejudice to the defendant."

In the instant case, the defendant entered a negotiated plea of guilty, knowing the exact sentence which he would receive. The trial judge, in accepting the plea of guilty, specifically informed defendant that he would impose the sentence of one to two years. On appeal, defendant has not shown that he was in any way harmed or prejudiced by this procedure. There is no contention by him that the plea agreement was not honored or that the sentence imposed was not the one agreed upon. Under these circumstances, any possible error in the trial judge's failure to further question defendant as to the terms of the plea agreement was harmless.

Defendant also argues that the trial judge's failure to question the defendant personally in open court to determine whether any force, threats or promises apart from the plea agreement had been used to obtain the plea of guilty as required by Supreme Court Rule 402(b), constitutes reversible error. In People v. Ellis (1974), 59 Ill. 2d 255, 320 N.E. 2d 15, the Supreme Court, in rejecting a similar contention, stated at page 257:

"If upon review of the entire record it can be determined that the plea of guilty made under the terms of a plea agreement was voluntary, and was not made as the result of force, threats or promises other than the plea agreement, the error resulting from failure to comply strictly with Rule 402(b) is harmless."

In the case before us the defendant, represented by counsel, entered his negotiated plea of guilty only after a pretrial conference with the court, knowing the exact sentence he would receive. He was admonished that by entering a plea of guilty he would waive his constitutional right to have a jury trial or a bench trial and his right to confront the witnesses against him. The trial judge informed him that upon a plea of guilty he would impose a sentence of one to two years. After all these admonishments defendant persisted in his plea of guilty which was then accepted by the trial court.

Upon a consideration of the entire record we conclude that except for those included in the plea agreement no promises were made to the defendant, and his plea of guilty was voluntarily entered and not the result of any force or threats. Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

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59834

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
)	
LAWRENCE SHINE,	)	HON. MARK E. JONES,
	)	Presiding.
Defendant-Appellant.)	

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a bench trial, Lawrence Shine (defendant) was found guilty of battery. (Ill. Rev. Stat. 1973, ch. 38, par. 12-3.) He was sentenced to one year in the county jail.

Defendant appeals contending only that he did not knowingly and understandingly waive his right to a trial by jury. Since defendant does not challenge the sufficiency of the evidence, a detailed recitation of facts is unnecessary.

When defendant's case was called, the trial judge informed him of the charge. When defendant stated that he could not afford an attorney, the public defender was appointed to represent him. Thereupon, the case was passed for the public defender to confer with his client. When the case was called again, it was passed once more to permit a witness for the State to be interviewed. When the case was finally called after the second interval, defense counsel in defendant's presence answered "ready for trial" and informed the trial judge that the plea was not guilty and that a jury was waived.

Defendant argues that this statement made by his attorney, appointed only a short time before trial, is insufficient to constitute a valid jury waiver. In People v. Sailor, 43 Ill. 2d 256, 253 N.E. 2d 397, the court held that an accused ordinarily speaks through his attorney and that by permitting his attorney in his presence and without objection to waive the right to a trial by

jury, a defendant is deemed to have acquiesced in and be bound by his attorney's conduct. The court stated that the trial court is entitled to rely upon the professional responsibilities of defense counsel and that a defendant will not be permitted to complain of an alleged error which he has invited by his own behavior and that of his counsel. The rule stated in Sailor is applicable to court appointed counsel and has been consistently applied by this court. People v. Baez, 20 Ill. App. 3d 896, 314 N.E. 2d 258; People v. Johnson, 18 Ill. App. 3d 854, 310 N.E. 2d 729; People v. Morgan, 18 Ill. App. 3d 153, 309 N.E. 2d 331; People v. Davis, 17 Ill. App. 3d 127, 308 N.E. 2d 34; People v. Irving, 15 Ill. App. 3d 563, 304 N.E. 2d 655; People v. Gray, 14 Ill. App. 3d 1022, 304 N.E. 2d 111; and People v. McClinton, 4 Ill. App. 3d 253, 280 N.E. 2d 795.

In accordance with the above authorities and after study of the recent decision of People v. Murrell, ____ Ill. 2d ____, ____ N.E. 2d ____, (General Nos. 46849, 46850, filed March 24, 1975), we find the waiver of jury trial in the cause before us to be sufficient.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

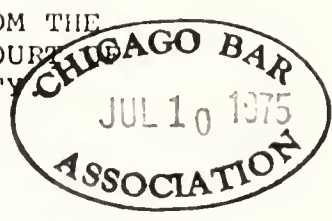
JUDGMENT AFFIRMED.

BURKE, P. J., and SIMON, J., concur.

(Abstract Only).

No. 60226

ALBERT C. MOORE,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellant,	)	COOK COUNTY
)	
vs.)	
)	
KNUDSEN TRUCKING COMPANY, INC.	)	HONORABLE
and SAM HASTER,	)	CHARLES P. HORAN,
	)	PRESIDING.
Defendants-Appellees.)	



Mr. PRESIDING JUSTICE MCGLOON delivered the opinion of the court:

This case arises out of an alleged rear-end collision which occurred on March 21, 1970. Plaintiff, Albert Moore, filed his complaint on March 23, 1972, alleging personal injuries and property damage, and defendants responded with a section 48 motion (Ill.Rev.Stat. 1973, ch.110, par.48) to dismiss the complaint filed after the two year statute of limitations had run. (Ill.Rev.Stat. 1973, ch.83, par.15.) In reply to defendants' motion to dismiss, plaintiff filed an affidavit arguing that defendants were estopped to assert the statute of limitations as a defense. On January 9, 1974, the trial court allowed defendants' motion and ordered the personal injury part of the complaint dismissed. The property damage portion of the complaint was subsequently settled. Plaintiff now appeals from the trial court's order of January 9, 1974 which dismissed the personal injury part of his complaint.

We dismiss the appeal.

In the present case plaintiff-appellant has failed to comply with Supreme Court Rule 342 (Ill.Rev.Stat. 1973, ch.110A, par.342.) Plaintiff has filed neither an abstract of the record, nor the excerpts from the record which are necessary for a full understanding of the issues presented in this case. Plaintiff has also failed to furnish a report of the proceedings. Under such circumstances we need not consider the merits of the case, and we may, in our discretion, summarily dismiss the appeal.

As stated in Denenberg v. Prudence Mutual Casualty Company (1970) 120 Ill.App.2d 68, 70-71, 256 N.E.2d 71-72:

"*** It is the duty of the appellant to present an abstract (or excerpts) sufficient to set forth every error relied upon for reversal. Dempski v. Dempski, 27 Ill.2d 69, 187 N.E.2d 734 (1963). A deficient abstract may be overlooked, inadequate excerpts disregarded, but the failure to file either abstract or excerpts warrants dismissal.

"On appeal, all reasonable presumptions are in favor of the judgment of the trial court, and the party who prosecutes an appeal has the burden of overcoming these presumptions by affirmatively showing the errors charged. Husted v. Thompson-Hayward Chemical Co., 62 Ill.App.2d 287, 210 N.E.2d 614 (1965). Although the entire record is available to the reviewing court (Rule 342(g)) the court is not required to search the record to find a reason for reversing the judgment. Elden v. Addison Farmers Mut. Ins. Co., 90 Ill.App.2d 417, 233 N.E.2d 42 (1967)."

Due to plaintiff-appellant's failure to file an abstract or excerpts from the record which are necessary for a determination of the issues presented on appeal, this appeal will be dismissed.

Appeal dismissed.

McNamara and Mejda, JJ., concur.

NO. 60510

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM
	)	CIRCUIT COURT
Respondent-Appellee,	)	COOK COUNTY.
)	
vs.)	_____
)	
ANGEL R. HERNANDEZ,	)	HONORABLE
	)	PHILIP ROMITI,
Petitioner-Appellant.	)	PRESIDING.

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.

Per Curiam



Angel R. Hernandez, petitioner, was originally charged by indictment with three counts of murder. On May 24, 1971, petitioner entered a negotiated plea of guilty to the indictment and was sentenced to a term of thirty to sixty years on each charge, the sentences to run concurrently.

On December 16, 1972, petitioner filed a pro se petition for relief under the Illinois Post-Conviction Hearing Act (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.). Upon motion of the State on November 1, 1973, petitioner's pro se post-conviction petition was dismissed without an evidentiary hearing. Petitioner appeals that dismissal.

Petitioner's only argument on appeal is that he was entitled to an evidentiary hearing on the allegation in his post-conviction petition that his pleas of guilty were not knowingly and intelligently entered due to a lack of the understanding of the English language and the insufficiency of the interpreter who was appointed at the trial court. A proceeding under the Illinois Post-Conviction Hearing Act is a new proceeding for the purpose of inquiring into constitutional phases of the original conviction which have not already been adjudicated. (People v. Derengowski, 44 Ill. 2d 476, 256 N. E. 2d 455.) To require a hearing, the burden is upon the petitioner to make a substantial showing of the denial of his constitutional rights in the proceedings which resulted in his conviction. (People v. Blewett, 11 Ill. App. 3d 1051, 298 N. E. 2d 366.) The Act requires that the petition be supported by "affidavits, records, or other evidence supporting its

allegations or shall state why the same is not attached." Ill. Rev. Stat. 1971, ch. 38, par. 122-2.

Petitioner in seeking a reversal relies upon the case of People v. Ruiz, 24 Ill. App. 3d 449, 321 N. E. 2d 746, (leave to appeal denied). There this court reversed and remanded the dismissal of a post-conviction petition for an evidentiary hearing. The petition alleged that petitioner's plea of guilty was not knowingly and intelligently entered in that he did not speak English and the interpreter who was appointed by the trial court was not proficient in Spanish and did not properly explain to petitioner his constitutional rights. In reversing, this court carefully pointed out that the record did not contain the original trial transcript and did not demonstrate, as the State had alleged, that the interpreter was represented to be qualified by petitioner and his counsel. The record did show that petitioner was unable to sign a jury waiver since he was nervous. The court concluded that on the basis of the record before it, petitioner's allegations were uncontradicted and were sufficient to require an evidentiary hearing.

In the case at bar, petitioner's pro se post-conviction petition stated only that petitioner did not knowingly and intelligently enter his plea of guilty since he could not understand the English language and the interpreter did not properly explain to him the consequences of his plea of guilty as stated by the trial court. The petition was not supported by affidavits and does not find support in the trial record. The transcript of petitioner's plea of guilty demonstrates that when petitioner's case was initially called, defense counsel informed the trial judge that he was unable to properly communicate with his client because of a language difficulty. The case was passed while an interpreter was called. When the case was recalled, Mr. Marco Pena, from the Berlitz School of Languages appeared and was sworn as an interpreter. Defense counsel stated that he was satisfied that Mr. Pena had sufficient proficiency in the Spanish language to adequately communicate with the petitioner. Defense counsel then, through the use of the interpreter, had a conference with his client. Thereafter, again through the use of an interpreter, petitioner entered a negotiated plea of guilty. During the plea of guilty, petitioner on many occasions personally responded yes or no

to the trial judge's questions after the interpreter had stated the questions in Spanish. The explanation of petitioner's rights by the trial judge was done in great detail and the admonishments were repeated twice. Based upon an examination of the entire record before us, we conclude that the trial judge properly determined that an evidentiary hearing was not required.

Accordingly, the judgment of the circuit court of Cook County dismissing petitioner's post-conviction petition is affirmed.

Judgment affirmed.

Abstract only.



60152

IN THE MATTER OF:
MICHAEL IRENE WELCH,
(Asserted To Be In Need Of
Mental Treatment).

)
) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
)
) HON. CORNELIUS COLLINS,
) Presiding.
)

Mr. JUSTICE GOLDBERG delivered the opinion of the court:

After a hearing without a jury, the circuit court found Michael Irene Welch (respondent) in need of mental treatment and ordered her hospitalized. (Ill. Rev. Stat. 1973, ch. 91-1/2, par. 9-6.) She appeals, contending: (1) the State did not establish by clear and convincing evidence that she was a person in need of mental treatment as defined in the Mental Health Code (Ill. Rev. Stat. 1973, ch. 91-1/2, par. 1-11); (2) she was denied due process of law because the standard of proof applied in this proceeding was less than that of proof beyond a reasonable doubt; and (3) her rights against self-incrimination were violated because the State called her as a witness under section 60 of the Civil Practice Act.

These proceedings were initiated on November 2, 1973, when Robert Jance, a Chicago police officer, filed a petition for emergency hospitalization concerning the respondent, alleging that she was a person in need of mental treatment and required admission to a mental hospital on an emergency basis. Ill. Rev. Stat. 1973, ch. 91-1/2, par. 7-1 et seq.

At the hearing held on November 7, 1973, Dr. Eli Mangoubi testified that he knew the respondent "from September" when he testified before Judge Schneider, who at that time found her in need of mental treatment. Two days later she agreed to sign "the voluntary papers" and was transferred to Passavant Hospital under the care of Dr. Nelson Borelli. She stayed there ten days and then signed out "against medical advice." When the court asked

him about his current examination of the respondent, he replied that he "didn't have too much to say" because she refused to talk to him. She was loud and called him names and refused to stay during the examination. On four occasions, he tried to interview her and she consistently refused to stay more than three minutes. In all, he examined her for about twelve minutes. The patient told him that when she was born the doctor injected serum into her veins and that she is therefore "a loser." She also told him, "this is schizophrenia paranoia, isn't it, but I am not schizophrenic."

The court overruled a defense objection to the doctor's testimony as based on an examination performed "two or three months ago" and the doctor was then allowed to testify concerning what the respondent told him on September 14. For example, she told him that since 1964 she had "many nervous breakdowns" and that she drinks but "has never tried to harm herself except by drinking too much." At times she would drink up to half a pint of vodka a day for the purpose of "passing out" because she felt "very miserable." She was drinking "in excess" and she was taking quaalude, referred to in the record as a diet pill, to make people lose weight. She told him she was a depressed person and "at times she doesn't remember what she is doing and she wanders around and walks in Chicago." She told him her family and friends did not understand her behavior and wanted her to get treatment, but that she did not think she needed treatment. At that time, in September, she was living with her mother who has since left the state. The respondent "got very upset" when, in September, he testified in court that she told him he was somehow seducing her by touching the phone while she was calling him. At this point in the proceedings, the respondent interrupted to state, "You are a pathological liar."

Dr. Mangoubi continued his testimony by saying that "this time" when she came to the hospital she called him all kinds of names and seemed to be very sexually preoccupied, very tense, anxious, but he stated, "I couldn't say she is overtly psychotic." He suspected there was "a paranoid delusion there***" but that she would not talk about it and concluded that "basically she suffers from mental illness"; diagnosing her condition as schizophrenia, probably schizoeffective type with paranoid trends. He testified there was no way to treat her outside of the hospital because she "doesn't seem to understand the meaning" of the voluntary commitment papers and that "When she signs, she doesn't realize what she signs for." When asked if he recommended hospitalization, he answered he did not see "another way to treat her", that last time they "tried it and it didn't work", the respondent was "back exactly after a month***."

At this point the Assistant State's Attorney asked that the record reflect that the respondent "has stood up, has been walking around the court room [sic] pacing during the doctor's testimony and has made various gestures with her hand and finger while the doctor was testifying."

On cross-examination, Dr. Mangoubi was asked how any delusions he observed would interfere with the respondent's "ability to take care of herself." He answered that if the respondent "acts the way she acts on the unit, calling people names, you know, and threatening them, I think they will react to that, you know. They may attack her or she may be threatened by other people and may try to defend herself when there is no threat." Asked if her behavior on the unit might be because she did not want to be in the hospital, he answered that the respondent had told him she tried to see Mayor Daley, and was insisting to see him before she was taken to the hospital by the police and was consequently "creating a disturbance at City Hall." When asked

if he would characterize that disturbance as a nuisance or as dangerous behavior, he answered, "It is a nuisance and dangerous in itself-no, no. But hopefully, she was arrested by officers who understood, at least it seems to me they recognized she was in need of mental treatment." When asked if he had enough contact with the respondent to make an adequate diagnosis, he answered: "Well, I had the last time. This time I don't have enough. I cannot say by talking to her four times three minutes. Twelve minutes it was in all-I cannot say that I had enough but I had spent maybe an hour and a half last time talking to her in September."

Over her objection, the respondent was called under section 60 of the Civil Practice Act and questioned concerning her employment as a school teacher, whether she had a dispute with the school principal and was marching the children around and around in the school. She answered by saying she "could use some obscenities", but would not, then by using an obscenity and by answering, "Look it up", and, "That is a lie" and giving other evasive and hostile responses.

When the State rested, the respondent testified that if she were to leave the court today she would "find an apartment someplace." When she had left the hospital she did not see a doctor as an outpatient and she was "not particularly" interested at that time in seeing a doctor as an outpatient. She did "not particularly" think she needed to be in the hospital. When asked to tell the court how she had ended up in court, she answered, "I just went to see Mayor Daley and I couldn't get in to see him."

After the court said there would be a finding of need of mental treatment, an unsworn person identified in the transcript only as "A social worker" and referred to as "a hospital employee" by the Assistant State's Attorney, addressed the court informally, saying, "I did want to add something. My feeling is that she

could be dangerous to others. She has kicked other patients on the unit without provocation and she has attempted to burn me with a lit cigarette on two occasions." The respondent denied this immediately, saying that the social worker had burned herself.

The Illinois Mental Health Code defines a person in need of mental treatment as a person afflicted with "a mental disorder", who as a result "is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury or to provide for his own physical needs." (Ill. Rev. Stat. 1973, ch. 91-1/2, pars. 1-11.) Dr. Mangoubi testified that the respondent was suffering from schizophrenia. Although he was unable, because of her refusal, to examine her in an in depth interview, as he wished, he did have the benefit of speaking with her on four recent occasions in addition to knowing the patient from her previous hospitalization approximately two months earlier in September. The record, therefore, clearly and convincingly establishes that the respondent was afflicted with a mental disorder.

However, the statutory test for commitment in Illinois requires more than a finding that the respondent is afflicted with a mental disorder and that hospitalization is medically indicated. This court has held that a mere finding of mental illness is an insufficient basis for concluding that a person may be hospitalized under the statute. The statute has been consistently construed to require in addition "explicit medical opinion regarding the patient's future conduct***." People v. Sansone, 18 Ill. App. 3d 315, 323, 309 N.E. 2d 733, leave to appeal denied 56 Ill. 2d 584; People v. Bradley, 22 Ill. App. 3d 1076, 1085, 318 N.E. 2d 267 and In re Sciara, 21 Ill. App. 3d 889, 896, 897, 316 N.E. 2d 153.

In contending that the specific statutory standards have been met, the State first urges that the respondent's "excessive drinking" in conjunction with the use of quaalude "could reasonably be expected to lead to severe physiological damage, if not death." However, the doctor's testimony was that the respondent told him that she had never tried to harm herself "except by drinking too much." The doctor did not testify to any harmful effects of excessive drinking while taking quaalude, nor did he testify that the respondent was doing so or that she had told him she was doing so. Therefore, even assuming that this behavior comes within the definition of "physical injury" of section 1-11 of the Mental Health Code and is the type of more or less immediate harm contemplated by that section, this cannot be considered to be a "fact" established by clear and convincing evidence in this record. Moreover, there is no medical opinion that respondent's drinking habits were likely to cause her or other persons physical injury.

The State next contends that the respondent's "tendency to wander into unsafe neighborhoods, apparently without complete comprehension or recall of her activities would certainly invite an attack upon herself." It is contended either that the respondent was not able to guard herself from physical injury or provide for her own physical needs. The doctor's earlier testimony was that in September the respondent told him she was "a depressed person" and "at times she doesn't remember what she is doing and she wanders around and walks in Chicago."

On redirect, the Assistant State's Attorney asked:

As a result of this schizophrenia to say that she is dangerous might be speculative, but do you feel that - would she reasonably be expected that her mental disorder might prevent her from taking care of herself or her own physical needs in the community?

Dr. Mangoubi answered:

Yes, this has happened before. She would, as I said before, she would walk around the city wandering in dangerous neighborhoods and she could expose herself to, you know, harm.

While Dr. Mangoubi's answer may be read as a medical opinion that the respondent, in the language of the statute, was reasonably expected to be, as a result of her mental disorder, unable to care for herself so as to "provide for" her "own physical needs", the tentative and equivocal nature of the testimony is highlighted by the questioner's use of the word "might" and by the doctor's use of the word "could". While the question was phrased in terms of respondent's ability to take care of her own "physical needs", the doctor's response was phrased in terms of respondent's ability to guard herself from physical injury - portions of the statute stated in the disjunctive. The doctor's opinion was not clear and convincing either that respondent was unable to guard herself from physical injury or that she was unable to provide for her own physical needs. Compare In re Sciara, 21 Ill. App. 3d 889, 897.

We also are of the opinion that the facts upon which Dr. Mangoubi's opinion was predicated were not established by clear and convincing evidence. The earlier testimony did not indicate that the respondent told the doctor that she was wandering into "dangerous neighborhoods", but only that she wandered around and walked "in Chicago." There is no factual basis in the record for the doctor's subsequent conclusion that she was walking in "dangerous neighborhoods". Putting aside the question of what a dangerous neighborhood might be, the record here does not establish any such propensity on the part of the respondent by clear and convincing evidence.

The State next contends that the respondent's "hostility and aggression, as seen from her liberal use of obscenities, her name calling and from the social worker's testimony as to respondent's

attacks on other patients and on the social worker herself could easily lead to respondent's being injured by an aggrieved third party, or to her injuring another person." The only statement in this record concerning any "attack" by the respondent on any third party comes from the person identified in the transcript only as "A social worker." This informal comment was made to the court after the court had made its finding. This unsworn person was not called as a witness or cross-examined. In addition, the respondent spontaneously denied that she had attacked this person. We cannot consider this type of statement as testimony.

The record does contain evidence of obscenities by the respondent and name calling, but does not show that such behavior was in any way associated with any attempts on her part to cause physical injury to anyone. And there is no medical opinion, certainly no clear and convincing medical opinion, that respondent was, as a result, likely to cause physical injury to anyone else. In fact, the medical evidence tends to establish a medical opinion that the respondent was "not dangerous to others." For example, Dr. Mangoubi described the incident at City Hall as "a nuisance", not as dangerous behavior and the State's Attorney even suggested in his questioning that it would be "speculative" to say that the respondent was dangerous.

We do not find in this record clear and convincing evidence or a clear and convincing medical opinion that the respondent was reasonably expected physically to injure herself or others or was unable to guard herself from physical injury or provide for her own physical needs. The statutory requirements have not been met.

It follows that we do not reach the respondent's remaining contentions regarding the necessity of proof beyond a reasonable doubt and the applicability of section 60 of the Civil Practice

Act to these proceedings. We note, however, that both of these issues have been authoritatively decided by the reviewing courts of Illinois. On the necessity for proof beyond a reasonable doubt, see People v. Ciancanelli, ____ Ill. App. 3d ____, ____ N.E. 2d ____, (General No. 60118, filed February 28, 1975); People v. Wisniewski, ____ Ill. App. 3d ____, ____ N.E. 2d ____, (General No. 60524, filed March 14, 1975); People v. Ralls, 23 Ill. App. 3d 96, 318 N.E. 2d 703; People v. Bradley, 22 Ill. App. 3d 1076, 318 N.E. 2d 267; In re Sciara, 21 Ill. App. 3d 889, 316 N.E. 2d 153; People v. Sansone, 18 Ill. App. 3d 315, 309 N.E. 2d 733, leave to appeal denied 56 Ill. 2d 584. On applicability of section 60 of the Civil Practice Act, see People ex rel. Keith v. Keith, 38 Ill. 2d 405, 410, 411, 231 N.E. 2d 387.

We therefore reverse the order finding respondent in need of mental treatment and ordering her hospitalized in a facility of the Department of Mental Health.

REVERSED.

BURKE, P. J., and SIMON, J., concur.

(Abstract Only).

59796

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Plaintiff-Appellee,	)	COOK COUNTY.
)	
v.)	_____
)	
RODNEY ADAMS,	)	HONORABLE
	)	JOHN E. PAVLIK,
Defendant-Appellant.	)	JUDGE PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J., and LORENZ, J.
 PER CURIAM, First District, Fifth Division.



Rodney Adams, defendant, was charged by information with the crime of burglary (Ill. Rev. Stat. 1973, ch. 38, par. 19-1). On April 24, 1973, defendant waived his right to an indictment and entered a plea of guilty to the information. He was sentenced to a term of two to three years. No verbatim transcript of his plea of guilty was made. Defendant filed a late notice of appeal which was allowed by the Illinois Appellate Court, First District, on December 18, 1973. In July 1974, the court granted defendant's motion for a summary reduction of sentence to a term of one to three years.

Defendant's first contention is that his conviction must be reversed because no verbatim transcript of his waiver of indictment and plea of guilty is available. Supreme Court Rule 401(c) which governs waivers of indictment and Rule 402(e) which covers pleas of guilty (Ill. Rev. Stat. 1973, ch. 110A, pars. 401(c) and 402(e)), both require that a verbatim record shall be transcribed, filed and made part of the common law record in all proceedings where the crime is punishable by imprisonment in the penitentiary. However, the fact that no verbatim transcript was filed does not automatically require a reversal of his conviction. People v. Dudley, 58 Ill.2d 57, 316 N.E.2d 773.



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In People v. Hopping et al., ___ Ill.2d ___, ___ N.E. 2d ___ (Nos. 46529, 46634, 46657, March Term, 1975), the Illinois Supreme Court held that the failure to make a verbatim transcript of a defendant's plea of guilty to a misdemeanor does not violate either the federal or state constitutional rights of the defendant. In so ruling the Supreme Court held that the transcript requirements of Supreme Court Rules 401(c) and 402(e) do not state constitutional requirements. The purpose of the Rules is merely to provide for the preservation of the complete record on the basis of which an attack could be made upon judgments of convictions in cases where lengthy imprisonment will be involved.

The only constitutional requirement is a record of sufficient completeness to permit proper consideration of the specific claims made by the defendant on appeal. A record of sufficient completeness does not translate automatically into a complete verbatim transcript. Mayer v. City of Chicago, 404 U.S. 189.

In the case at bar, defendant has not made any specific complaint that his waiver of indictment was not knowingly and intelligently entered or that the trial judge in accepting his plea of guilty failed to comply with Supreme Court Rule 402. Had any deficiencies existed defendant could have easily brought them to the attention of the trial court by presenting a motion to withdraw his plea of guilty.

In addition, Supreme Court Rule 323, made applicable to criminal proceedings by Supreme Court Rule 612, provides for the preparation of a proposed report of proceedings by the appellant where no verbatim transcript is available. The appellee may then propose amendments or prepare his own report, both of which are submitted to the trial judge for settlement after



the holding of hearings if necessary. By this method defendant could have brought any specific deficiencies before this court.

Here, defendant did not make a motion to withdraw his plea of guilty in the trial court nor did he prepare a bystander's report of proceedings to this court. Defendant on appeal has not alleged that his waiver of indictment was not knowingly and understandingly entered or that his plea of guilty was in any way improper. Under these circumstances, we conclude that defendant's constitutional rights were not violated by the failure to provide a transcribed report of his waiver of indictment and plea of guilty.

Defendant's second contention is that the information which charged him with the offense of burglary was insufficient in that it failed to specify ownership of the building. The indictment, in pertinent part, stated that the defendant had:

"On or about April 1, 1973 at Surprime [sic] Oil Gas Station 15400 Wood St. Harvey, Illinois, Cook County committed the offense of burglary in that he without authority knowingly entered a building with the intent to commit therein theft."

In People v. Gregory, 59 Ill.2d 111, 319 N.E.2d 483, the Illinois Supreme Court recently held that it is not necessary that an indictment charging burglary specify the owner of the property. The court said:

"While at one time it was necessary that an indictment for burglary identify the owner of the building concerned, if it was known, such an allegation of ownership is no longer required"

We consider that count I of the indictment adequately charged the defendant with the crime of burglary. It charged the commission of the elements of the crime (Ill. Rev. Stat. 1969, ch. 38, par. 19-1(a), quoted above), and its allegations were sufficiently particularized"



In the case at bar, as in Gregory, the indictment set forth the place and time of the occurrence and the necessary elements of the crime of burglary as specified by statute. The indictment was sufficient to charge the defendant with the offense of burglary.

In light of the view as expressed herein, the judgment of the circuit court is affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.





No. 61015

PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
Respondent-Appellee,	)	CIRCUIT COURT OF
	)	COOK COUNTY
v.)	
	)	HONORABLE
JOSEPH CROSS,	)	FRANK J. WILSON,
Petitioner-Appellant.	)	JUDGE PRESIDING.

Before Downing, P.J., Stamos and Leighton, JJ.

PER CURIAM

The petitioner, Joseph Cross, was convicted, along with Mark Jones following a jury trial of murder, and he was sentenced to a term of 15 to 45 years. This court affirmed the petitioner's conviction on direct appeal in People v. Jones (1973), 12 Ill. App. 3d 643, 299 N.E.2d 77. On December 18, 1972, petitioner filed a pro se petition pursuant to the provisions of the Illinois Post-Conviction Hearing Act. (Ill. Rev. Stat. 1971, ch. 38, par. 122-1 et seq.) The public defender of Cook County was appointed counsel for petitioner, and he filed a supplemental petition for post-conviction relief which was denied following a hearing in the trial court on July 23, 1974.

Petitioner appealed and the public defender of Cook County was appointed his counsel on appeal. On February 13, 1975, the public defender filed a written motion in this court for leave to withdraw as appellate counsel supported by a brief as required by Anders v. California (1967), 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493. The brief states that the appeal would be wholly frivolous and without merit. Copies of the motion and the brief were mailed to the petitioner on February 11, 1975. On February 19, 1975, this court advised the petitioner of the motion to withdraw and informed him that he had until April 20, 1975 to file any additional points he might choose in support of his appeal. Petitioner has not responded.

The public defender, in his brief, discusses two possible arguments that could be made on appeal and concludes that

they are without merit and could not possibly be successful. The first contention is that the hearsay testimony of one Leonard Mack at the original trial deprived the petitioner of his right to confront the witnesses against him. The matter was in fact considered at some length in the original appellate court opinion. Mack, who did not witness the crime, at some point identified the defendants. At a pre-trial motion to suppress identification testimony, the State indicated it was unable to locate Mack. The trial judge specifically admonished all counsel that they were not to raise the matter of Mack's identification or in any way bring it before the jury. Nevertheless, Cross's attorney cross-examined a witness and elicited the fact that Mack had identified the petitioner. This court held that a motion for mistrial had been properly denied because the testimony was "brought out by the defense despite the trial court's admonition." 12 Ill. App. 3d 643, 651.

The second issue discussed by the public defender is petitioner's claim that he was denied the effective assistance of counsel at the original trial. The public defender concludes this issue is without merit since it is waived because not raised on the direct appeal.

In People v. Kamsler (1968), 39 Ill. 2d 73, 74, 233 N.E. 2d 415, cited by the public defender, the court stated:

"It is well settled that where a person convicted of a crime has taken an appeal from the judgment of conviction on a complete record, the judgment of the reviewing court is res judicata as to all issues actually decided by the court and all issues which could have been presented to the reviewing court if not presented, are waived."

The public defender concludes, and we agree, that the first issue discussed above is without merit because the appellate court decision is res judicata, and the second issue is without merit because it is deemed waived because the petitioner did not raise it in his direct appeal to this court.

We have independently examined the record and concur in the opinion of the public defender that the arguments thus raised

do not have any merit. Our inspection of the record does not disclose any additional possible grounds that would support an appeal. Accordingly, the public defender of Cook County is granted leave to withdraw as counsel on appeal, and the judgment of the circuit court of Cook County dismissing the petition is affirmed.

Motion allowed;
Judgment affirmed.

(Publish abstract only.)

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End Dv.
10 opinions

61239

JACK AHR,)	
)	
Plaintiff-Appellee,)	APPEAL FROM
)	
v.)	CIRCUIT COURT,
)	
	)	COOK COUNTY.
)	
JOELLEN CONRARDY,	)	Honorable Lawrence Genesen,
	)	Presiding.
Defendant-Appellant.)	

Mr. PRESIDING JUSTICE DIERINGER delivered the opinion of the court:

The plaintiff, Jack Ahr, brought this action in the Circuit Court of Cook County, Municipal Department, First District, seeking to recover from the defendant, Joellen Conrardy, the sum of \$145 for printing and design services. On June 11, 1974, the court, sitting without a jury, entered a judgment in favor of the plaintiff in the sum of \$145 plus costs. On September 16, 1974, the court entered judgment for the plaintiff in the amount of \$100 for "vexatious delay." The defendant appeals from both judgments.

The issues presented for review are whether the court erred by denying a motion to transfer the cause to the Third Municipal District, and whether the judgment of \$100 for vexatious delay was proper.

The appellee has not filed an appearance or brief in accordance with the Supreme Court Rules, and in such circumstances this court may determine the case on its merits or, in its sound discretion, reverse, based on the failure of the appellee to comply with the Supreme Court Rules. People ex rel. Pullman Bank & Trust Co. v. Fitzgerald, (1973) 14 Ill. App.3d 247; Shinn v. County Board of School Trustees, (1970) 130 Ill. App.2d 908; Woodward v. Woodward, (1968) 96 Ill. App.2d 551.

In view of the fact that the plaintiff has abandoned his case, we see no reason why we must act as his attorney by searching the law and the record. Therefore, we decline to go into the merits of the case, and the case is reversed pro forma.

The judgment of the Circuit Court of Cook County is reversed.

REVERSED.

BURMAN and JOHNSON, JJ., concur.
Abstract only.

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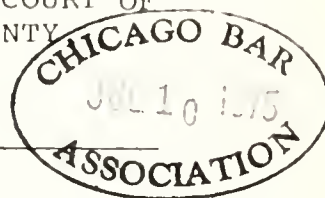
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PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

LONNIE HOLMES,
Defendant-Appellant.

) APPEAL FROM THE
) CIRCUIT COURT OF
) COOK COUNTY



) HONORABLE
) MARVIN E. ASPEN,
) JUDGE PRESIDING.

BEFORE BARRETT, P.J., DRUCKER, J. and LORENZ, J.

PER CURIAM, First District, Fifth Division.

Lonnie Holmes, defendant, appeals from his conviction on January 3, 1973 after a bench trial of the offense of robbery (Ill. Rev. Stat. 1971, ch. 38, par. 18-1), and sentence of two to six years; and the denial of his post-conviction petition filed pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.). We have consolidated the appeals.

At defendant's trial, Harold E. Wright testified that between 8:30 and 9:00 P.M., on February 2, 1972, he drove to his office at 9317 Cottage Grove, Chicago, Illinois, and parked his automobile on the street. As he turned the key to his office door, he was attacked by the defendant and a second man. The men pushed him to the floor inside his office. He testified that there were lights on the street and inside of his office. While the second man held him, the defendant pulled off his pants. The defendant took Wright's gun which he kept in the office, held it to his head and threatened to kill him if he did not produce more money. At this time defendant's face was within two and a half feet of his face for a period of two to three minutes. The men took \$200 in United States



currency, his identification papers, his savings pass book and the keys to his business and car. During the robbery, the second man referred to the defendant as "Holmes" when asking him a question. Immediately after the men left, Wright called the police. Thereafter, he discovered that his 1965 Oldsmobile had been taken by the robbers.

On February 5, 1972, he viewed five photographs and identified the defendant as one of the men who had robbed him. Later that day he viewed a lineup of three men and again identified the defendant as the man who had robbed him.

John Shank, a Chicago police officer, testified that in February, 1972 he received an armed robbery case report involving Harold Wright at 93rd and Cottage Grove and noted that in that report one of the offenders had been referred to by the name of "Holmes." Officer Shank testified that thereafter he took the group of photographs, including a photograph of the defendant, over to Harold Wright to view. The victim identified the photograph of the defendant as one of the men who had robbed him. Thereafter, the defendant was placed under arrest. The victim viewed the lineup and again identified the defendant as one of the men who had robbed him.

George Berry testified that on February 2, 1972, at approximately 1:30 P.M., he stopped by defendant's home and together they walked to the home of Berry's girlfriend, Debra Veal. Defendant did not leave the Veal home until approximately 11:30 P.M.

Lonnie Holmes, defendant, testified that on February 2, 1972, George Berry picked him up at his home and together they proceeded to the home of Debra Veal, Berry's girlfriend. The defendant testified that he remained in the Veal house until approximately 11:30 P.M. Defendant denied ever robbing Harold Wright.



On August 23, 1973, defendant filed a post-conviction petition pursuant to the Post-Conviction Hearing Act (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.). Attached to the petition was a transcribed report of the preliminary hearing. In that petition, defendant alleged that Chicago Police Officer Shank had solicited him to engage Attorney Albert Sheppard as defense counsel. Defendant also alleged that Attorney Sheppard was incompetent in that he had not obtained or inspected the police reports and the preliminary hearing, had not asked for a list of witnesses, had not subpoenaed the photographs from which the complaining witness identified him and did not produce certain alibi witnesses at trial.

In response to defendant's post-conviction petition, the State filed a motion to dismiss supported by the affidavit of Attorney Albert Sheppard. In the affidavit Mr. Sheppard stated that Officer Shank did not at any time on his behalf solicit the defendant to retain him as defense counsel and that prior to trial he did have the transcript of the preliminary hearing which he had carefully reviewed. The trial court denied defendant's post-conviction petition.

OPINION

The basis of defendant's contention both in his direct appeal and in the appeal from the denial of his post-conviction petition are that his trial counsel was incompetent. Since the same contention is raised in both proceedings, we will consider the proceedings together. In a case where defendant is represented at trial by privately retained counsel, a court on appeal will not reverse the conviction because of the incompetency of counsel unless the representation is of



such low caliber as to amount to no representation at all or reduce the court proceedings to a farce or a sham. People v. Torres, 54 Ill.2d 384, 297 N.E.2d 142; People v. Redmond, 50 Ill.2d 313, 278 N.E.2d 766; People v. Stanley, 50 Ill.2d 320, 278 N.E.2d 792.

Defendant argues that the failure of trial counsel to make the routine pre-trial motions to receive the police reports and transcripts of testimony demonstrate incompetency of counsel. The record demonstrates that immediately after defense counsel began the cross-examination of Wright, he requested and received the grand jury testimony of each of the State's witnesses and the three police reports pertaining to the case. Counsel cross-examined Wright, using some of these documents. After Wright testified the cause was continued for over one month during which time defense counsel had an adequate opportunity to review the documents. In addition, the affidavit filed by defense counsel in the post-conviction proceedings demonstrated that he had the preliminary hearing testimony of all of the State's witnesses and had carefully reviewed it prior to trial. The record adequately demonstrates that defense counsel did have the preliminary hearing testimony, the grand jury testimony and all the police reports pertinent to the case.

Defendant next alleges that incompetency of counsel is demonstrated by the fact that defense counsel did not file a motion to suppress the identification which was the basis of defendant's conviction. The testimony adduced at trial demonstrated that defendant was initially identified when Wright picked out defendant's photograph from a group of photographs which he viewed. Thereafter, Wright again identified the defendant out of a lineup of three men. The record demonstrates that there was nothing suggestive in the manner in



which defendant was identified. All of the evidence pertaining to defendant's identification had been adduced at the preliminary hearing at which Officer Shank testified in great detail as to the circumstances surrounding defendant's identification. Further, the record demonstrates that at the preliminary hearing defense counsel made a motion to suppress the identification which was denied. Defense counsel's affidavit filed in the post-conviction proceeding demonstrates that he had reviewed the preliminary hearing transcript. He was therefore aware of the manner in which defendant was identified. The fact that as a matter of trial tactics an attorney does not file a motion to suppress does not establish incompetency of counsel. People v. Green, 36 Ill.2d 349, 223 N.E.2d 101; People v. Abrams, 8 Ill.App.3d 636, 291 N.E.2d 16.

Defendant's next complaint is that defense counsel failed to refer to an alibi defense in his opening statement, but referred only to the presumption of innocence. The court has often stated the rule that appellate review of trial counsel's competency does not extend to those areas involving the exercise of judgment and discussion of trial tactics. (People v. Martin, 44 Ill.2d 489, 256 N.E.2d 337; People v. Walker, 2 Ill.App.3d 1026, 279 N.E.2d 23.) Here, defense counsel's opening remarks were understandable especially in the light of the fact that he was engaged in a bench trial. Until the State had completely presented its case, defense counsel did not know if it would be necessary for him to present a defense or whether he could rest after the State presented its case without presenting a defense. Under these circumstances, we conclude that counsel's decision not to



refer to the alibi defense in the opening statement was a matter of trial tactics and does not in any way demonstrate incompetency of counsel.

Defendant next contends that incompetency of counsel is demonstrated by the fact that defense counsel failed to call two alibi witnesses who had testified at the preliminary hearing. The record demonstrates that at trial defense counsel called the defendant and George Berry to establish defendant's alibi. Again defense counsel's affidavit demonstrates that he was aware of the preliminary hearing testimony of the other two alibi witnesses. The calling of the two other alibi witnesses would have run the risk that their testimony could have led to contradictions with the testimony of the defendant and Berry. Defense counsel's judgment at the time of the trial was that the testimony of two alibi witnesses was sufficient. Under these circumstances, the failure of defense counsel to call two other defense witnesses does not demonstrate incompetency of counsel.

Defendant's final allegation is that his post-conviction petition alleged that the police officer had solicited the defendant to hire a specific defense counsel. First we note that the alleged act of soliciting by the police officer does not in any way demonstrate incompetency of counsel, which is the only argument defendant makes on this appeal.

In addition, defendant's affidavit is directly contradicted by that of defense counsel where he denied the allegation of solicitation. In a post-conviction proceeding the trial judge may receive proof by way of affidavits, depositions, oral testimony or other evidence. (Ill. Rev. Stat. 1973, ch. 38, par. 122-6.) The trial court may in its discretion



consider affidavits in lieu of testimony. (People v. Humphrey, 46 Ill.2d 88, 263 N.E.2d 77.) As in any other case tried by the court without a jury, the credibility of witnesses in a post-conviction hearing is a matter for the trial court to determine and that determination will not be disturbed on review unless manifestly erroneous. (People v. Wease, 44 Ill. 2d 453, 255 N.E.2d 426.) The trial court properly concluded the testimony of counsel by way of affidavit that there was no solicitation on his behalf by the police officer to be more credible than that of the defendant.

The judgments finding defendant guilty and denying his post-conviction petition are affirmed.

AFFIRMED.

PUBLISH ABSTRACT ONLY.



28 I.A. 797^{3D}



60770

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff-Appellee,)
)
v.)
)
ALBERT B. LOGAN,)
)
Defendant-Appellant.)

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

HONORABLE
JAMES M. BAILEY,
Presiding.

PER CURIAM:

Before DEMPSEY, McNAMARA and MEJDA, JJ.

Albert B. Logan, defendant, was indicted for the offense of murder of Ruby Jean Pride, in violation of section 9-1 of the Criminal Code (Ill. Rev. Stat. 1971, ch. 38, par. 9-1). He was found guilty by a jury of the lesser included offense of involuntary manslaughter and sentenced to a term of 3 to 10 years. On appeal he contends that he was denied a fair trial by certain allegedly improper comments made by the prosecutor and by the admission into evidence of photographs of the deceased.

Clarence Pride, brother of the deceased, testified for the State that he received a telephone call from the defendant about 1:00 A.M. on February 3, 1973, during which defendant said he "had just kicked Jean's ass." The witness testified that the defendant and Ruby Jean had been living together in an apartment at 3811 West Ferdinand Avenue, in Chicago, for a period of five or six years, although they were not married. He testified further that the defendant called a second time that morning, about 3:30, and when asked where Ruby Jean was, he stated that she was asleep on the couch and he could not awaken her.

Frank Rucker testified for the State that he and his wife, Beatrice, lived across the hall from the Logan-Pride apartment and had known them for a period of about six months prior to February 2,

1973; the witness was familiar with the voices of those two individuals. At about 10:00 P.M., on February 2, Ruby Jean made a telephone call to the police from the Rucker apartment, after which the officers arrived and took defendant away; Ruby Jean soon returned to her own apartment.

Mr. Rucker testified that about 1:00 A.M., on February 3, he had been asleep when he heard a car door slam; thinking someone was tampering with his automobile, he went to the window and saw defendant entering the apartment building. He heard him tell Ruby Jean to open the door, heard the door being kicked open, and heard defendant say, "Ruby, you thought I didn't have enough money to pay my bond." He then heard "licks and screams" from the Logan-Pride apartment which lasted about half an hour. He heard the sound of beating as though flesh, something soft, was being struck, and Ruby Jean screaming, "You is killing me, stop" and "I'm dying, stop." He heard the defendant say, "I'm going to kill you." He could hear no other voices except defendant's and Ruby Jean's, with defendant doing most of the screaming, while the voice of Ruby Jean was "low" and not heard too well by the witness. He returned to bed when the noise stopped, and was later awakened by the police knocking on his door. When he looked into the Logan-Pride apartment he saw Ruby Jean Pride lying on the floor. The witness identified People's Exhibits 2, 3, 4 and 5 as accurately portraying the scene he had then observed.

Beatrice Rucker testified for the State, substantially corroborating the testimony of her husband concerning the noise from the Logan-Pride apartment at about 1:00 A.M. on that date. She was familiar with the voices of the defendant and Ruby Jean Pride, and could hear the latter's voice clearly, whereas the voice of the defendant was lower and she was unable to make out what he was saying. She heard the noises from the Pride apartment while she was in bed, while her husband had been back and forth between their bedroom and living room.

Chicago Police Officer Butler testified for the State that he responded to a radio call about 10:00 P.M. on February 2, 1973, and transported the defendant from the building to the police station pursuant to a disorderly conduct complaint filed against him by Ruby Jean Pride. Chicago Police Officer Nelson testified for the State that he had talked with the defendant at the police station prior to 12:30 A.M., on February 3, 1973, and when he and another officer took defendant to the corner of Pulaski Road and Ferdinand Avenue in a police vehicle, where he left the car; that location was one and one-half blocks from defendant's apartment, and the noise from the car door could not have been heard for a distance greater than three-quarters of a block; defendant was not intoxicated at that time and was in a calm condition.

Chicago Police Officer Michalak testified for the State that he and his partner responded to a radio call at about 4:00 A.M. on February 3, 1973, and proceeded to the Logan-Pride apartment where he noticed the door to the front apartment was slightly ajar. Upon entering the apartment he saw the body of Ruby Jean Pride on the floor, covered with a sheet, with blood running from her head across the floor. Defendant was seated nearby, talking on the telephone. The defendant told the officer that as he was about to enter the apartment he heard a noise; he saw the deceased lying on the floor of the apartment; he went into the kitchen where he found the rear door open; he closed and locked that door.

Officer Michalak observed that the frame on the interior front door which had a chain lock had been broken; he saw a broken metal chair in the apartment; he noticed several locks on the back door, only one of which was locked, and several bags of garbage standing near the door which would have made it difficult to open the door without disturbing the bags. The officer identified People's Exhibits 2 through 7 as photographs accurately depicting the body of the deceased; he also identified People's

Exhibits 8 through 10 as photographs accurately depicting the interior of the front door to the Logan-Pride apartment, the broken chair, and the interior of the rear door of the apartment. He also testified that he had touched the doorknob of the back door before the members of the police crime lab had arrived, but that he had been wearing gloves at the time; and that he was the first officer on the scene and that the sheet originally covering the body was later removed for the purpose of police photographs.

The protocol of death prepared by the Coroner's Office, which was introduced into evidence because the pathologist who had performed the autopsy and prepared the protocol was deceased at the time of trial, disclosed that the deceased was 31 years of age, and that multiple and severe bruises and lacerations had been inflicted upon her, including an "external violent injury to the neck anterior" which was designated as the cause of death. The police crime lab report by stipulation disclosed the presence of hair and blood—matching that of the deceased—on the defendant's clothing and shoes, also on the metal chair and a leg broken from the chair; the clothing of the deceased was also in a damaged condition.

The trial court admitted into evidence People's Exhibits 2, 3, 6, 7, 8, 9 and 10; Exhibits 2, 3, 6 and 7 were admitted over defense objection, the court expressly noting that they showed views of the body which tended to corroborate the evidence adduced at trial. Exhibits 4 and 5 were not admitted, since they duplicated the other four showing the body, and Exhibits 8, 9 and 10 were admitted without objection. It was further stipulated that defendant was 37 years of age.

The sole evidence adduced on behalf of the defendant was the testimony of Chicago Police Officer Sykes who related that he saw the defendant on the morning of February 3, 1973, and noticed nothing unusual about his hands, head or face; he had observed no scratches, bruises or

the like. The officer did notice what appeared to be blood on the wash bowl, the tub, and a washcloth in the bathroom of the Logan-Pride apartment.

After closing arguments, the jury was instructed as to the law, including instructions as to the offense of murder as well as that of involuntary manslaughter. The court then commented that the pathologist's protocol would not be sent to the jury because of an objectionable paragraph contained in it, but that People's Exhibits 2, 3, 6, 7, 8, 9 and 10 would be submitted to the jury, to which defense counsel replied, "Fine, Judge."

Defendant initially contends that the prosecutor engaged in prejudicial conduct during trial and during closing arguments by commenting during the questioning of Officer Michalak that the witness knew who had committed the crime; by commenting that defense counsel had improperly attacked the Police Department; by stating, with reference to defense counsel's argument as to the absence of fingerprints, "I wish I had a nickel for every time I heard that argument in this building"; by impugning defense counsel's credibility in comparison to the State's witness Frank Rucker; by implying that defense counsel had reason to lie on behalf of defendant; by referring to defendant's sole witness, Officer Sykes, as a smoke screen; and by commenting that defendant failed to testify at trial. We have reviewed the record as to each of the allegedly improper comments made by the prosecutor, and conclude that none of these comments, either singly or combined, prejudiced defendant's right to a fair trial.

As to the comment concerning the State's witness' knowledge of the offender, defense counsel's immediate objection was sustained and his further request that the remark be stricken and the jury instructed to disregard it was allowed and the jury so instructed. Further, defense counsel did not see fit to include the matter in the written motion

for a new trial. It is clear that defendant cannot now be heard to complain in this regard. People v. Williams (1963), 28 Ill. 2d 53, 55, 190 N. E. 2d 796.

The comments of the prosecutor here alleged by defendant to have been intended to belittle his counsel at trial do not so appear when considered in their context and in light of the entire record. None of the comments was objected to by defense counsel, at whom they were allegedly directed, and all related to the evidence adduced at trial or to defense counsel's prior comments to the jury in closing argument and were fair comment by the prosecutor in that regard. See People v. Moore (1973), 55 Ill. 2d 570, 304 N. E. 2d 622; People v. Powell (1973), 53 Ill. 2d 465, 292 N. E. 2d 409; People v. Davis (1974), 18 Ill. App. 3d 793, 310 N. E. 2d 682.

The final instance of alleged prejudicial comment by the prosecutor advanced here by defendant relates to the statement during the closing argument that "the man who [committed the offense] by all the testimony, uncontradicted testimony . . . undenied testimony . . . and unrebutted testimony is Albert Logan." Defendant argues that this constituted an improper reference to his failure to testify at his own trial. This comment came at the very end of the prosecutor's final summation, was objected to by defense counsel and overruled. When viewed in the context of the entire final argument the effect of the comment upon the jury is at best equivocal. Nevertheless, in light of the overwhelming circumstantial evidence of defendant's guilt which was before the jury, it is questionable whether the comment had any effect at all; the jury's determination would not have been different had the comment not been made. (People v. Brown (1972), 51 Ill. 2d 271, 281 N. E. 2d 682; Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824.) Defendant was not prejudiced by any of the prosecutor's comments, singly or combined, now advanced by defendant as depriving him of a fair trial.

Defendant further contends that the four photographs of the deceased, People's Exhibits 2, 3, 6 and 7 which were admitted into evidence, served only to inflame the jury and deprived him of a fair trial; he argues that those photographs were simply cumulative of the other evidence before the jury.

The State's theory of the case was murder by the intentional killing of the deceased or by the intentional infliction of injuries upon her which created the strong probability of death or great bodily harm. The photographs in question depicted the extent of the injuries and also showed the circumstances viewed by the officers who first arrived at the scene. They were therefore admissible to prove the issues in the case. The admission of the photographs rested within the sound discretion of the trial court, and we find no abuse of that discretion. (People v. Nicholls (1969), 42 Ill. 2d 91, 245 N. E. 2d 771.) Under the circumstances it is immaterial that the matters portrayed in the photographs may have shocked the jury. People v. Speck (1968), 41 Ill. 2d 177, 202-204, 242 N. E. 2d 208 (rev. on other grounds 403 U.S. 946).

The defendant was not prejudiced by the comments of the prosecutor nor by the admission into evidence of the photographs, either singly or in combination, as he now contends. The judgment of the circuit court of Cook County is affirmed.

Affirmed.

7/11/11
2 Apr
3 Div

3D
281.A. 798



60570

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE CIRCUIT
Respondent-Appellee,	)	COURT OF COOK COUNTY.
)	
vs.)	
)	
CLYDE GUNN,	)	HON. JAMES D. CROSSON,
	)	Presiding.
Petitioner-Appellant.)	

PER CURIAM: (FIRST DISTRICT, FIRST DIVISION)

Before Goldberg, Egan and Simon, J. J.

Clyde Gunn, petitioner, was convicted of armed robbery and sentenced to a term of five years to fifteen years. On his appeal, that judgment was affirmed in People v. Gunn (1973), 15 Ill. App. 3d 1050, 305 N.E. 2d 598. His subsequently filed petition for relief under the Illinois Post-Conviction Hearing Act was dismissed upon respondent's motion without an evidentiary hearing. (Ill. Rev. Stat. 1973, ch. 38, par. 122-1 et seq.)

Petitioner appeals, contending that he was denied equal protection of the laws since he was tried as an adult for the offense of armed robbery committed when he was 17 years of age, where a female of the same age would have been tried as a juvenile under the provisions of and entitled to the benefits of the Juvenile Court Act then in effect; he argues that section 2-7(1) of the Act improperly distinguished between males and females of the same age and that his conviction must therefore be reversed. Ill. Rev. Stat. 1967, ch. 37, pars. 701-1 et seq., 702-7(1).

This question was disposed of in People v. Ellis (1974), 57 Ill. 2d 127, 311 N.E. 2d 98, as reaffirmed in People v. Seets (1974), 57 Ill. 2d 213, 311 N.E. 2d 97. The court in Ellis held that while section 2-7(1) of the Act, then in effect, was invalid as a violation of the equal protection clause of the United States Constitution, no detriment resulted to the 17 year old male there

involved who had been tried as an adult since the court's invalidation of that statute rendered it inapplicable to both males and females who were not under the age of 17 years.

Petitioner in the instant case was not deprived of his constitutional right to equal protection of the laws for the reasons advanced, and the trial court's dismissal of the instant post-conviction petition is therefore affirmed.

JUDGMENT AFFIRMED.

(Abstract Only).



60560

PEOPLE OF THE STATE OF ILLINOIS,)
)
 Plaintiff-Appellee,) APPEAL FROM THE CIRCUIT
) COURT OF COOK COUNTY.
 vs.)
) HONORABLE VINCENT L. TONDRIK,
 BENNY L. BAGGETT,) Presiding.
)
 Defendant-Appellant.)

BEFORE DOWNING, P.J., STAMOS and LEIGHTON, JJ.

PER CURIAM:

On April 17, 1974, Benny L. Baggett entered a plea of guilty to an indictment charging him with the September 8, 1973, armed robbery of Stanley Branauskas. (Ill. Rev. Stat. 1973, ch. 38, par. 18-2.) The trial court accepted the plea and sentenced the defendant in accordance with the State's recommendation to a term of not less than four years nor more than four years and one day. Defendant now appeals, contending that his plea of guilty should be vacated because the trial judge did not specifically and personally inquire, as required by Supreme Court Rule 402(b), whether any force or threats or any promises, apart from the terms stated in the plea agreement itself, were used to obtain the plea or to otherwise determine that the plea was "truly voluntary." Ill. Rev. Stat. 1973, ch. 110A, par. 402(b).

On April 17, 1974, defendant's retained counsel informed the court that the defendant wished to plead guilty and that he wished to make certain remarks so that "at some later time" he would not "hear from some committee of the Bar Association" that his client "was incompetently advised." Counsel explained the State had recommended a two to six year sentence in the felony court but the defendant "for some unaccountable reason" declined that and the State was now "offering four flat," meaning that

defendant would get about ten months off for good behavior and with credit for time already served he would be "out in something like, hopefully, two and a half years." Although not admitting guilt, counsel indicated he felt the State had "a solid case" and that it was his recommendation that the defendant should accept the State's offer.

The assistant State's Attorney stated on the record that the State's recommendation would be "four years to four years and a day in the Illinois State Penitentiary," defense counsel explained the meaning of a jury waiver and a pre-sentence investigation; defendant stated he waived these, was 22 years of age and had three years of high school. When asked by his lawyer, "And you are not pleading guilty just to get it over with are you?", he answered, "Right." Defendant's mother, who was in court, stated that she had heard what counsel had said to her son and that she had no objections to what had been discussed. Counsel also explained the minimum penalty for a Class 1 felony, such as armed robbery, "starts at four years."

The court then questioned the defendant concerning whether, as his lawyer had stated, he wished to change his plea from not guilty to guilty and the defendant answered affirmatively. The court then advised the defendant that he was waiving his right to jury trial and that upon conviction for armed robbery the court could sentence him to any number of years not less than four years and any number of years "after that," and the defendant answered affirmatively that he still persisted in his guilty plea. The court then accepted the plea and entered judgment on the finding. The State's Attorney then asked the defendant whether "any other promises or any threats" were made to force him to plead guilty and the defendant answered, "No." In response to further questions by the assistant State's Attorney, defendant said he understood the State would recommend four years to four years and a day and

that the court did not have to follow that recommendation.

The assistant State's Attorney stated that there was a stipulation that if the complainant, Stanley Branauskas, Officer Mazzorana, Officer Tracy, Investigator Krueger, and Investigator Copeland and Sukkie Molina were called to testify the substance of the testimony would be that on September 8, 1973, Mr. Branauskas was in the vicinity of 9315 South Rhodes, employed as an insurance agent, leaving those premises with the proceeds of certain insurance premiums when he saw the defendant walking toward him reading what appeared to be a letter; after entering his automobile, the victim was approached by the defendant who placed a weapon to his person, announced a robbery, forcibly removed \$60 in cash from his person and fled; the responding police officers found at the scene a letter written by Sukkie Molina to the defendant and upon investigation, the officers obtained from Sukkie Molina, the name of the individual to whom she had written the letter and found it was the defendant; the officers obtained a photograph of the defendant at the Cook County Jail, placed that photograph together with nine others and the victim positively identified the defendant from the photographs as the individual who robbed him on September 8. Defendant further stipulated he was 22 years of age, that he waived all defects in the indictments, and any and all pre-trial motions that were or could have been filed on his behalf. The assistant State's Attorney noted that the complainant and the arresting officers were in court and concurred in the State recommendation. The court then made a finding that there was a factual basis for the plea of guilty.

In aggravation the State "tendered" the seriousness of the offense and asked that the court concur in the State's recommendation, and defendant's counsel again addressed the court stating that he had explained to defendant's mother and admonished the

defendant that the true test of his rehabilitation is that he had acknowledged his guilt, knows the seriousness of the offense and pledged he will "never be involved in a crime again." The court then entered sentence of not less than four years and not more than four years and a day in the Illinois State Penitentiary.

Defendant contends that the trial court did not determine if this plea was "truly voluntary." He argues that his retained attorney's statements to the court reflected "his unmistakable exasperation with his client." Recently, in People v. Ellis, (1974) 59 Ill.2d 255, 257, 320 N.E.2d 15, the court considered the effect of the trial judge's failure to specifically inquire whether any force or threats or any promises apart from the plea agreement were used to obtain the plea and held a failure to comply strictly with Supreme Court Rule 402(b) would not justify a reversal and would be "harmless" if "upon review of the entire record" it could be determined that the plea was "voluntary." In the case at bar, the defense attorney, acting out of an abundance of caution, placed on the record a detailed statement of the nature of his dealings with the defendant leading up to the plea of guilty. The defense attorney, himself, made it a matter of record that the defendant had earlier refused a recommendation of two to six years. Counsel was eager, and properly so, to make it clear that the decision to plead guilty on April 17, 1974, was the defendant's decision and not something he was being pressured into. The defendant's mother was present in court and stated she had no objection. The defendant himself, made it clear by several responses to the court's questions, to his own attorney's questions and to the State's Attorney's questions that he did indeed wish to plead guilty understanding what the State would recommend and that the judge need not follow the State's recommendation. Although the court did not ask specifically if there had been "any other promises or threats"

made to "force" the defendant to plead guilty, the assistant State's Attorney did inquire and the defendant answered, "No." The defendant does not suggest that any other recommendation was agreed upon or that the plea was in fact anything other than voluntary. Upon review of the entire record it is clear that the plea was voluntary and the error of failing to comply strictly with Rule 402(b) is therefore harmless. Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

PUBLISH ABSTRACT ONLY.



60942

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellant,	)	APPEAL FROM THE CIRCUIT
	)	COURT OF COOK COUNTY.
vs.)	
	)	HONORABLE E. C. JOHNSON,
URBAN A. HAASER,	)	Presiding.
)	
Defendant-Appellee.)	

BEFORE DOWNING, P.J., STAMOS AND LEIGHTON, JJ.

PER CURIAM:

Urban A. Haaser, defendant, was issued a traffic citation and complaint by the Illinois State Police for the operation of an allegedly overweight semi-trailer vehicle on a state highway, in violation of the Illinois Vehicle Code. (Ill. Rev. Stat. 1973, ch. 95 1/2, pars. 15-100 et seq.) The trial court sustained defendant's motion to suppress as evidence the print-out record of the weight of the vehicle which was obtained by the arresting officer upon a subsequent weighing of the vehicle on a portable scale; the trial court's determination was based upon the method employed by the officer in weighing the vehicle and its alleged conflict with the method prescribed by statute. The State prosecutes this appeal pursuant to Supreme Court Rule 604(a) (1) from the order sustaining defendant's motion to suppress. Ill. Rev. Stat. 1973, ch. 110A, par. 604.

Defendant-appellee has failed to file an appearance in these appellate proceedings. Under such circumstances this court may reverse the trial court's order pro forma, or may, in its discretion, consider the case on its merits. Compare: People v. Elliott, 9 Ill.App.3d 178, 292 N.E.2d 58, and People v. Farrell, 20 Ill.App.3d 786, 314 N.E.2d 538.

The issue which the State asks us to resolve is whether the weighing of an allegedly overweight vehicle pursuant to

section 15-112 of the Illinois Vehicle Code is also subject to the standards set forth in section 8 of the Illinois Weights and Measures Act. (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 15-112; ch. 147, par. 108.) We are mindful of the previous statements made by this court concerning the method of weighing highway vehicles which was employed by the arresting officer in the instant case, and of the instant trial court's determination that the method thus employed was contrary to section 8 of the Weights and Measures Act, supra. See People v. Fair, 61 Ill.App.2d 360, 210 N.E.2d 593; People v. Frascchetti, 73 Ill.App.2d 449, 220 N.E.2d 98; People v. Hansen, 74 Ill.App.2d 49, 220 N.E.2d 96; People v. Andrews, 82 Ill.App.2d 59, 227 N.E.2d 91. A determination on the merits of this case would, in our opinion, have far reaching effects upon the enforcement in this State of the weight regulations contained in the Vehicle Code.

As noted, defendant-appellee has failed to appear, answer or otherwise participate in these appellate proceedings, having apparently abandoned his position taken at trial concerning the relationship between the two statutes in question. This court has the benefit of but a single brief of the issue on this appeal and we are therefore reluctant to dispose of the case on its merits. We accordingly reverse the order of the trial court pro forma and remand the cause for further proceedings with directions that People's Exhibit #1 for identification be admitted into evidence pursuant to the State's motion in that regard. See People v. Elliott, supra; see also C. Casey Homes, Inc. v. Village of Oak Lawn, 5 Ill.App.3d 17, 282 N.E.2d 483 (abst.).

ORDER REVERSED AND
CAUSE REMANDED WITH
DIRECTIONS.

PUBLISH ABSTRACT ONLY.

281.1. 810^{3D}



60313

HELEN WHYTE,)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
v.)	
	)	HONORABLE
JOHN E. WHYTE,	)	ROBERT C. BUCKLEY,
	)	PRESIDING.
Defendant-Appellee,)	

Mr. JUSTICE EGAN delivered the opinion of the court:

On November 18, 1968, the plaintiff Helen Whyte filed her complaint for divorce against the defendant, John E. Whyte, who was personally served and appeared by his attorney. He filed a motion to dismiss the complaint for divorce, but no answer was filed; and a divorce was granted on August 1, after a hearing by a judge other than the one who entered the order from which this appeal is taken. The plaintiff testified that she was pregnant as a result of the marriage and expected to be delivered sometime in August. The trial court in response to a request for child support said that the plaintiff would have to come into court after the baby was born and ask for support at that time.

Several petitions involving related matters were filed later and hearings conducted, but the question of child support retroactive to the baby's birth was held in abeyance. On November 13, 1973, an order was entered increasing child support payments from \$32 to \$58 a week but denying retroactive child support. The plaintiff's attorney's petition for attorney's fees was allowed in the sum of \$750. The petition for attorney's fees and costs on appeal was denied. The plaintiff appeals from the orders denying retroactive child support and denying the petition for costs and attorney's fees on appeal; and the order fixing attorney's fees at \$750.

The defendant has not filed an appearance or brief in this court in accordance with Supreme Court Rule 341. (Ill.Rev.Stat. 1973, ch. 110A, par. 341.) Under such circumstances in our

discretion we may enter a pro forma reversal or dispose of the appeal on its merits. People ex rel. Pullman Bank & Trust Co. v. Fitzgerald, 14 Ill.App.3d 247, 302 N.E.2d 429.

The history of this case reveals that the defendant has sought to delay and avoid an adjudication of the issues. He has had numerous changes in lawyers. He has disobeyed court orders and has sought to mislead the trial court with false testimony concerning his income. He has made spurious allegations and has taken inconsistent positions. His position on paternity is but one example in this record that illustrates the flavor of the man: He filed a motion to dismiss the suit for divorce on March 5, 1969, alleging that the plaintiff had cohabited with him between December, 1968 and January 30, 1969. In spite of that assertion, he later contested his obligation to pay child support on the ground that he was not the natural father. The plaintiff offered testimony showing when she had relations with him and he offered no evidence to the contrary. After the court held that he was the natural father, in response to the plaintiff's petition for an increase in child support, he filed a petition for custody of the child, which he had previously denied was his, and alleged in part that he had not contested the issue of paternity.

Under the circumstances, therefore, we will exercise our discretion by reversing pro forma the order denying retroactive child support and the order denying costs and attorney's fees on appeal and remanding the cause to the trial court with directions to enter appropriate awards for retroactive child support and costs and attorney's fees for services rendered by the plaintiff's counsel on appeal to this court.

The attorney for the plaintiff had expended 60 hours including 11 court appearances, which in turn included several contested hearings, in the prosecution of this case. We recognize that the ability of the plaintiff to pay is one factor to be considered in determining

attorney's fees. But much of the time expended was caused by the unjustified conduct of the defendant. The sum of \$750 represents a fee of \$12.50 an hour. In our view, under the circumstances of this case, it is inadequate. We therefore fix the attorney's fees for the plaintiff at \$1500. See Greenbaum v. Greenbaum, 14 Ill. App.3d 217, 302 N.E.2d 165.

JUDGMENT REVERSED IN PART
AND REMANDED WITH DIRECTIONS;
AND MODIFIED IN PART.

GOLDBERG, J. and SIMON, J. concur.

ABSTRACT ONLY.

28 I.A. ^{3D} 811



61097

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	APPEAL FROM THE
Plaintiff-Appellee,	)	CIRCUIT COURT
	)	OF COOK COUNTY.
vs.)	
)	
BERNARD BAKER,	)	HONORABLE
	)	LOUIS B. GARIPPO,
Defendant-Appellant.	)	PRESIDING.

Before Stamos, Leighton, and Hayes, JJ.

PER CURIAM:

Bernard Baker, defendant, was found guilty after a bench trial of the crime of robbery (Ill. Rev. Stat. 1973, ch. 38, par. 18-1). He was sentenced to a term of one to five years. Defendant appeals, arguing that the trial judge in imposing sentence improperly considered a prior arrest of the defendant which had not resulted in a conviction. Defendant asks this court to reverse and remand for resentencing or in the alternative for a reduction of his sentence.

Since the defendant does not challenge the sufficiency of the evidence against him, the facts adduced at trial may be summarized. On March 11, 1973, Mr. Isaac Baker was assaulted and robbed while entering the vestibule of his building located at 1801 South Lawndale, Chicago, Illinois. The men took \$30 from Baker. As a result of the injuries received during the robbery, Baker spent three days in the hospital.

Defendant's only argument on appeal is that the trial judge in imposing sentence improperly considered a prior arrest of the defendant which had not resulted in a conviction. The transcript of the testimony demonstrates that, after defendant was found guilty, the trial judge asked if he was in custody on another charge. Defendant replied that he had a pending armed robbery charge. Defense counsel asked the defendant if

there had been a preliminary hearing on that charge and defendant replied in the affirmative. Defense counsel then asked defendant in what court the charge was pending. At that point the trial judge interrupted and stated, "We won't go into that". A hearing in aggravation and mitigation was then held, after which defendant was sentenced to a term of one to five years.

In People v. Bey, 51 Ill. 2d 262, 281 N.E. 2d 638, the Supreme Court, in referring to an argument similar to that made by the defendant in the case at bar stated:

"We have repeatedly held that proof of a pending indictment is properly presentable in aggravation as are a wide variety of other factors (People v. Spicer, 47 Ill. 2d 114), and the trial court is presumed to recognize incompetent evidence and disregard it. (People v. Fuca, 43 Ill. 2d 182.)"

See also People v. Tolefree, 14 Ill. App. 3d 754, 303 N.E. 2d 555; People v. Malone, 19 Ill. App. 3d 24, 311 N.E. 2d 216.

In the case at bar, the trial judge, after finding defendant guilty, inquired as to whether defendant was being held on another charge. Thereafter the defense counsel started to elicit the details as to that pending charge when the trial judge interrupted stating that he did not wish to go into those matters. The trial judge's original questioning of the defendant was within the bounds of the law stated by the Supreme Court in Bey. Moreover, the judge's mere question did not indicate that he was placing any reliance upon the pending charge in imposing sentence. That charge was one of many factors brought out during the sentencing stage of the proceedings. Indeed, the trial judge's comment, when he interrupted defense counsel who was attempting to elicit further details as to the pending offense, that he did not wish to go into those matters supports the

conclusion that he did not in fact place any reliance on the pending charge in imposing sentence.

It is precisely in this respect that the case relied upon by defendant (People v. Steve Jackson (1968), 95 Ill. App. 2d 193, 238 N.E. 2d 196) is distinguishable. In that case, the Court said (at page 201):

"In the instant case it is readily apparent that in sentencing the defendant the trial court gave consideration to and placed weight upon his prior arrests and other encounters with the law which did not result in convictions, as evidenced by the Court's comment just prior to sentencing: 'I am going on his entire record and he is one apparently from his record who is quick to engage in violence.' * * * Inasmuch as this inadmissible evidence affected the extent of the sentence imposed upon defendant, . . . the sentence is reduced. . . ."

After a careful review of all the evidence adduced at trial, we are of the opinion that the sentence imposed by the trial judge was proper.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Publish abstract only.

5/20/75
And Du
4 opin.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

FILED
MAY 27 1975

Walter T. Sullivan
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,)	
)	
Plaintiff-Appellee,	)	Appeal from the Circuit Court of
	)	Saline County.
vs.)	
)	
JAMES R. SULLIVAN,	)	Honorable Jack C. Morris,
	)	Judge Presiding.
Defendant-Appellant.)	

PER CURIAM:

The defendant, James R. Sullivan, was charged with two acts of theft in the Circuit Court of Saline County. He waived indictment and pled guilty to both charges and was sentenced to concurrent terms of 2 to 6 years imprisonment.

Several issues are presented for review; (1) whether there was substantial compliance with the requirement of Supreme Court Rules 401(b) and 402, (2) whether it was reversible error to sentence the defendant on two charges of theft and (3) whether the sentences of 2 to 6 years imprisonment on each charge were excessive. We need consider only the last issue.

Prior to sentencing, the court requested the parties to submit evidence in aggravation and mitigation. The prosecutor stated that the defendant's prior criminal record and his co-operation on locating the other stolen property were considered by the State in making its sentence recommendation. The defendant waived the pre-sentence investigation and report, and the court imposed the concurrent sentences of 2 to 6 years imprisonment. The record fails to reflect ^{that} the judge considered any other evidence pertaining to aggravation and mitigation except the statements regarding what was considered by the State in requesting the sentence that was subsequently imposed. The court set forth no reasons for imposing a minimum sentence in excess of the minimum required by the Illinois Revised Statutes, 1973, Ch. 38, Secs. 1005-8-1(b)(4) and (c)(4) and People v. Matychowiak, 10 Ill.App.3d 739, 310 N.E.2d 394 (1974).

The People impose no objections to the defendant's request for modification of the sentence.

We therefore modify the concurrent sentences imposed to a minimum of 1 and a maximum of 3 years.

Affirmed as Modified.

PUBLISH ABSTRACT ONLY.

Karns, J. and Moran, J., not participating.

No. 74-134

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICTFILED
JUN 6 - 1975FIFTH DISTRICT OF ILLINOIS
APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS, )	)	Appeal from the Circuit Court of
Plaintiff-Appellee, )	)	St. Clair County.
vs.))	
MARVIN KITTERMAN, )	)	Honorable John J. Hoban,
Defendant-Appellant. )	)	Judge Presiding.

Mr. JUSTICE G. MORAN delivered the opinion of the court:

The defendant Marvin Kitterman was indicted for the crime of involuntary manslaughter. He entered a negotiated plea of guilty to the charge of reckless homicide, the assistant state's attorney agreeing not to oppose his request for probation. The defendant was sentenced to the custody of the Department of Criminal Corrections for a term of one to three years. In this appeal, he claims that the trial court erred in imposing imprisonment instead of probation or periodic imprisonment. Alternatively, he requests that his sentence be reduced to time served.

A reviewing court may reduce a sentence of imprisonment to a sentence of probation but should do so only where it appears from the record that the trial court abused its discretion in denying the defendant's request for probation. People v. Rednour, 24 Ill.App. 3d 1072, 322 N.E.2d 492. The defendant, after taking four "speed" pills, went driving with some friends in Belleville, Illinois. He was traveling forty to fifty miles per hour through a residential area when a police patrol car gave chase. The defendant attempted to evade pursuit. He ran a stop sign hitting another car on the passenger side. A passenger in the other car died as a result of injuries suffered in the collision. The defendant ran from the scene and fled to Chicago. Three weeks after the incident he returned to Belleville. He was told by his father that he was wanted for involuntary manslaughter and turned himself in. Prior to the incident the defendant had lived with his mother and his younger brothers and sisters in Wisconsin. He stated he had to quit school in the middle of the ninth grade to help support his brothers and sisters. Later he had joined the Marine Corps but was given an undesirable discharge for being away without leave. He had been arrested twice before but had not been tried

on either charge. After his mother's death, he had come to Belleville to inform his father of her death. At the time of the incident he was living with a friend. He had been unemployed for a few months. He said that if he received probation, he would live with his father who had secured a job for him. He stated that he realized that he had committed a serious crime. The court psychologist in a psychological evaluation of the defendant, described the defendant as a submissive, sensitive young man who, though educationally retarded, was unlikely to be of further danger to himself or others. The defendant was nineteen when the incident occurred. Based upon the above facts, the trial court concluded that the defendant should receive a sentence of one to three years. While we feel that the court might have appropriately chosen probation, conditional discharge or periodic imprisonment, from our review of the record, we cannot say that the trial court abused its discretion in imposing the sentence it did.

The judgment is therefore affirmed.

Judgment affirmed.

CONCUR:

Jones, Carter, JJ.

PUBLISH ABSTRACT ONLY.

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	
	)	Appeal from the Circuit Court of the
Plaintiff-Appellee,	)	Fourth Judicial Circuit, Christian
vs.	)	County.
)	
JOHN EARL MEBUST,	)	Honorable George W. Kasserman,
	)	Judge Presiding.
Defendant-Appellant.)	

FILED
JUN 6 - 1975

Mr. JUSTICE G. MORAN delivered the opinion of the court:

Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

Defendant appeals from a judgment of the circuit court of Christian County finding him guilty of the crime of attempted armed robbery and sentencing him to a minimum of one year and a maximum of three years to the Illinois Department of Corrections pursuant to a negotiated plea.

Defendant's sole contention is that the trial court erred in denying his application for probation.

During the hearing of the negotiated plea the state's attorney said that he would neither recommend nor oppose probation.

The offense in the instant case was planned several days in advance. The defendant and his co-defendants decided on this particular victim after considering and rejecting another plan to rob a Kroger store. The defendant was to drive the getaway car and also share in the proceeds of the offense. The testimony of the co-defendant John Brawner, indicated that defendant Mebust and defendant Watson talked Brawner into aiding in the commission of the offense. This testimony was uncontradicted.

The defendant had purchased a 45-caliber automatic pistol some weeks prior to this offense and had practiced its use. He took the firearm with him during the offense, and knew that the other participants were similarly armed. Mebust knew, at the time the other participants left the car at the scene of the crime, that they took their firearms along with them. He made no attempt to dissuade them from the completion of the offense, or to withdraw from further participation in the offense at any point.

Under these facts, we are unable to say that the trial court abused its discretion in denying defendant's application for probation.

For the foregoing reasons the judgment of the circuit court of Christian
County is affirmed.

Judgment affirmed.

CONCUR:

Eberspacher, Karns, JJ.

PUBLISH ABSTRACT ONLY.

NO. 73-74

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FILED
JUN 9 - 1975Walter T. Simmons
FIFTH DISTRICT OF ILLINOIS
CLERK APPELLATE COURT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Pulaski County
Plaintiff-Appellee,)	
)	
v.)	
)	
LINDA CAUDELL,	)	Honorable George Oros,
	)	Judge Presiding.
Defendant-Appellant.)	

Mr. JUSTICE CARTER delivered the opinion of the court:

On October 5, 1972, a complaint was filed in the Pulaski County Circuit Court, charging the appellant, Linda Caudell, a then 16 year old high school student, with theft of property under \$150 in value. The complaint charged the appellant with theft of a purse, and various items contained in the purse, from one Cindy George, on October 2, 1972. Miss George was also a high school student, and a classmate of the appellant. After a trial by jury, appellant was found guilty of the charge, and sentenced to a period of probation not to exceed one year. From the judgment, the appellant brings this appeal.

For the reasons set forth below, we need not consider the issues raised by the appellant on this appeal.

We note from the record that at the time of pronouncing judgment on January 16, 1973, the trial court found the appellant to be 16 years old. There is nothing in the record before us which indicates that the appellant juvenile was first brought before the juvenile court. Indeed, the record indicates that criminal prosecution of the appellant juvenile was initiated by the filing of a criminal complaint in the circuit court.

The Juvenile Court Act prohibits criminal prosecution of juveniles until the juvenile has been brought before the juvenile court upon a petition. The State's Attorney does not have discretion to decide in what manner to proceed against the juvenile until after the petition is filed before the juvenile court. Then, and only then, may the State's Attorney determine the court in which the juvenile is to be prosecuted. And even at this stage of the proceeding, the Juvenile Court Judge may object to the removal of a case from

the jurisdiction of the juvenile court, in which case the matter of transfer is referred to the chief judge of the circuit for a decision and disposition. Section 2-7 of the Juvenile Court Act, Chapter 37, Section 702-7, as amended to 1972. The statute has since been amended so that a Juvenile Judge, designated by the Chief Judge of the Circuit, may on motion of the State's Attorney, enter an order permitting prosecution under the criminal laws. Ill.Rev.Stat. 1973, chap. 37, sec. 702-7. As set forth in People v. Rahn, 15 Ill.App.3d 170, 304 N.E.2d 161 (4th App., 1973), reversed 59 Ill.2d 303, 319 N.E.2d 787 (Ill., 1974), the Illinois Supreme Court stated:

"The discretion which the statute gave to the State's Attorney to decide in what manner to proceed against the juvenile was expressly conditioned on the filing of a petition which alleged the commission of the crime. . . . The prohibition against criminal prosecution of juveniles continued until the juvenile had been brought before the juvenile court upon a petition. The section then authorized the chief judge to overrule the prosecutor's determination if the juvenile court judge objected to the transfer of the case for criminal prosecution." People v. Rahn, supra, at 319 N.E.2d 789.

With certain exceptions set forth in Section 2-7 of the Juvenile Court Act (which are not applicable in this case), the ultimate determination to commence criminal prosecution of a juvenile is a judicial one. The record before us reflects that the decision to prosecute the appellant juvenile criminally was made in the sole discretion of the State's Attorney, in violation of the requirements of the Juvenile Court Act. Accordingly, by our reviewing power under Chapter 110A, Section 615(a), we find that the failure to comply with the Juvenile Court Act in this case constituted plain error affecting substantial rights of the appellant, and accordingly, the judgment of the trial court is reversed and remanded to the Circuit Court of Pulaski County.

Judgment reversed and remanded.

CONCUR: G.MORAN, KARNS, JJ.

PUBLISH ABSTRACT ONLY

74-297)
74-298) Cons.
74-299)

^{3D}
28 I.A. 1035

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

FIRST DIVISION

Present -- Honorable GLENN K. SEIDENFELD, Presiding Justice
Honorable WILLIAM L. GUILD, Justice
Honorable ALBERT E. HALLETT, Justice
LOREN J. STROTZ, Clerk
WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

No. 74-297)
No. 74-298) Cons.
No. 74-299)

FILED

JUN 2 1975

IN THE
APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FIRST DIVISION

LOREN J. STROTT, Clerk
Appellate Court, 2nd District

PEOPLE OF THE STATE OF ILLINOIS,)
) APPEAL FROM THE
Plaintiff-Appellee,) CIRCUIT COURT FOR
) THE FIFTEENTH
v.) JUDICIAL CIRCUIT,
) LEE COUNTY, ILLINOIS.
)
MICHAEL T. LYNN a/k/a MICHAEL)
T. LINN,)
)
Defendant-Appellant.)

Mr. JUSTICE HALLETT delivered the opinion of the court:

The defendant, Michael T. Lynn, was sentenced to a one and one-half to five year term of imprisonment, after he had pleaded guilty to three separate burglaries. The defendant on appeal is represented by the State Appellate Defender. After examining the record, the defendant's counsel has filed a motion for leave to withdraw as counsel on appeal. Having independently examined the record, considering all appealable issues, we grant the motion for leave to withdraw as appellate counsel, and affirm the judgment of the circuit court.

On April 11, 1974, the defendant, Michael T. Lynn, was arrested pursuant to three complaints for burglary filed on that date. After being advised of his in custodial rights, the defendant gave a statement to police officers concerning the burglaries. A search warrant directed to the defendant's apartment was issued and executed. On April 18, 1974, the defendant was indicted and charged with having committed three burglaries. At his arraignment, a public defender was appointed to represent the defendant. Subsequently, the public defender filed a motion for discovery, which was answered by the State.

74-297)
74-298) Cons.
74-299)

Thereafter, the defendant moved to withdraw his previously entered pleas of not guilty and to enter pleas of guilty to each charge. The trial judge accepted the defendant's pleas of guilty to the burglary charges of the three indictments. Presentence investigation was waived pursuant to Ill. Rev. Stat. 1973, ch. 38, par. 1005-3-1, and the defendant was sentenced to serve three concurrent terms of one and one-half to five years. This sentence was appropriate under Ill. Rev. Stat. 1973, ch. 38, par. 1005-8-1(b)(3), (c)(3).

The defendant's appellate counsel has requested that we allow a motion for leave to withdraw as counsel, and has submitted a brief supporting this motion, pursuant to Anders v. California (1967), 386 U. S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1386, and People v. Jones (1967), 38 Ill. 2d 384, 231 N. E. 2d 390. The brief submitted by defendant's appellate counsel reviews the procedures in accepting the defendant's guilty pleas, the arrest, the statements to the police officers, the issuance of the search warrant, and the sufficiency of the indictments, and concludes that the record does not contain any meritorious issue to present to this court. In accordance with Anders, notice of counsel's motion for leave to withdraw and the brief were forwarded to the defendant on December 18, 1974. The motion was continued to February 8, 1975, to allow the defendant time to raise any additional matters on his behalf. He has not responded.

In the defendant's appellate counsel's brief, the compliance of the guilty plea hearings with Illinois Supreme Court Rule 402 is considered. (Ill. Rev. Stat. 1973, ch. 110A,

74-297)
74-298) Cons.
74-299)

par. 402.) Counsel concludes that in view of the recent decisions of People v. Krantz (1974), 58 Ill. 2d 187, 317 N. E. 2d 559; People v. Dudley (1974), 58 Ill. 2d 57, 316 N. E. 2d 773; People v. Warship (1974), 59 Ill. 2d 125, 319 N. E. 2d 507; People v. Ellis (1974), 59 Ill. 2d 255, 320 N. E. 2d 15, there are no meritorious issues regarding compliance with Supreme Court Rule 402.

During the guilty plea hearings, the trial judge personally informed the defendant(1) of the nature of the charges, (2) of the minimum and maximum sentences and fines which could be imposed, (3) that he had the right to persist in his pleas of not guilty, and (4) that if he persisted in his not guilty pleas that he had the right to a trial, whereas if he pleaded guilty, he would not have a trial of any kind. Further, the trial judge asked the defendant in open court if any promises, threats, or coercion had induced his pleas of guilty. The defendant responded that it had not. The court then ascertained that the defendant's pleas of guilty were entered voluntarily, and the factual bases, to which the defendant and counsel stipulated, were read into the record. Having examined the record of the hearings, we agree with counsel that there was, indeed, substantial compliance with the requirements of Supreme Court Rule 402 at the hearing. We therefore find that any appeal based on non-compliance of the guilty plea hearings with Supreme Court Rule 402 would not be meritorious.

In addition, counsel considered in the brief supporting the motion to withdraw as appellate counsel, whether any errors arose in connection with the defendant's arrest, the issuance of the search warrant, and his statements to police

74-297)
74-298) Cons.
74-299)

officers. Since a voluntary plea of guilty waives all nonjurisdictional errors, (People v. Phelps (1972), 51 Ill. 2d 35, 38, 280 N. E. 2d 203) appellate counsel determined that no issue could be argued concerning these matters in defendant's direct appeal.

Moreover, the defendant's appellate counsel concludes in its brief that the indictments were sufficient to charge the offenses of burglary. Whether an indictment is void presents a jurisdictional issue which is not waived by a defendant's plea of guilty. (People v. Gregory (1974), 59 Ill. 2d 111, 319 N. E. 2d 483.) Having reviewed the three indictments in light of People v. Gregory, wherein the sufficiency of a burglary indictment was challenged, we conclude that the indictments were sufficient.

After a full examination of all the proceedings in accordance with the requirements of Anders, we concur in the opinion of defendant's appellate counsel that the points raised are not arguable on their merits and that an appeal is wholly frivolous. Our independent examination of the record does not disclose any other meritorious grounds for appeal. Accordingly, the motion of defendant's counsel for leave to withdraw as counsel on appeal is granted, and the judgment of the circuit court is affirmed.

Motion allowed; judgment affirmed.

AFFIRMED.

SEIDENFELD, P.J., and GUILD, J., concur.

3D
281A. 1036

73-320

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:
On June 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

FILED

JUN 2 1975

LOREN J. STROTZ, Clerk
~~Appellate Court, 2nd District~~

STEPHEN LESTON, JR.,
and ANNA LESTON,
Plaintiffs-Appellants,
v.
TEXAS COMPANY, a
Delaware Corporation,
Defendant-Appellee.

)
)
)
)
) Appeal from the Circuit
) Court of DuPage County for
) the Eighteenth Judicial
) Circuit of Illinois.
)
)

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

Plaintiffs appeal from a judgment, after a bench trial, dismissing plaintiffs suit for reformation of a lease for want of equity, and granting defendant's counterclaim for specific performance of its exercise of an option to purchase the land covered thereby, for \$25,000.

On September 2, 1949, plaintiffs entered into a written lease with the defendant covering a parcel of land in Elmhurst, Illinois, for a 20 year term (which commenced effective September 22, 1952), at a rental of \$100 per month and an option to lessee to extend the lease for two additional five-year periods at the same rental. The lease also provided that (1) special assessments were to be paid by and remain the obligation of the lessor and (2) lessee (defendant) was granted an option to buy the premises for \$25,000. Defendant filed its counterclaim for specific performance of that option.

Mr. Leston testified that the lease resulted from oral conversations with defendant's agent (a Mr. McGuire) who had since died. The trial court sustained defendant's objection to testimony by Mr.

Leston of his conversations with Mr. McGuire concerning negotiations which resulted in Mr. Leston's execution of the lease in question.

On appeal plaintiffs contend that (1) the court erred in sustaining that objection, (2) there was mistake of fact so as to justify reformation or rescission of the lease and (3) the contract was unconscionable. During oral argument plaintiffs' counsel stated in effect that had Mr. Leston been permitted to testify concerning the conversation with Mr. McGuire he would have been able to establish the mutual mistake and the unconscionability.

The trial court properly sustained the objection to such testimony as to Mr. Leston's conversation with defendant's agent. It was clearly inadmissible under the so-called Dead Man's Statute (Ill. Rev. Stat. 1973, ch. 51, par. 4), Reese v. Melahn, 1 Ill. App. 3d 63 (reversed on other grounds in 53 Ill. 2d 508). Thus plaintiffs adduced no testimony to establish mutual mistake of fact or that defendant was guilty of any unconscionable conduct. The judgment was therefore not against the manifest weight of the evidence and is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.

73-440

^{3D}
281.A. 1037

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held
at Elgin, on the 2nd day of December, in the year of our Lord
one thousand nine hundred and seventy-four, within and for
the Second District of Illinois:

SECOND DIVISION

Present -- Honorable L. L. RECHENMACHER, Presiding Justice
 Honorable WALTER DIXON, Justice
 Honorable THOMAS J. MORAN, Justice
 LOREN J. STROTZ, Clerk
 WILLIAM A. KLUSAK, Sheriff

BE IT REMEMBERED, that afterwards, to wit:

On June 2, 1975 the Opinion of the Court was filed
in the Clerk's office of said Court, in the words and figures
following, viz:

FILED

JUN 2 1975

LOREN J. STROTZ, Clerk
Appellate Court, 2nd District
Abstract

No. 73-440

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
SECOND DIVISION

IN THE INTEREST OF)	
SUSAN M. SUDLER, a minor	No. C-72-1472)
)
IN THE INTEREST OF)	
DAVID SUDLER, a minor	No. C-72-1473)
)
IN THE INTEREST OF	)	Appeal from the Circuit
JOHN SUDLER, a minor	No. C-72-1474	) Court of DuPage County
		) for the Eighteenth Judicial
		) Circuit of Illinois.

MR. PRESIDING JUSTICE RECHENMACHER delivered the opinion of the court:

In a Juvenile Court proceeding the involved minor, Susan M. Sudler, was found to be a neglected minor and made a ward of the Juvenile Court. This is an appeal from an order of the Juvenile Court sequestering the proceeds of the sale of a house to pay certain costs resulting from such proceeding. The appellants (Jane du Fresne (a/k/a Jane Sudler) and Eugene du Fresne, mother and step-father, respectively, of the above minors) also contend there was not sufficient evidence to justify the court's finding that Susan M. Sudler was a neglected minor.

This controversy grows out of a protracted and bitter divorce action. The mother of the involved minor, Jane du Fresne, and Louis Sudler, were married in 1954 and after a stormy marriage divorced in 1968. They had three children, Susan born in December, 1955; David born in 1957, and John born in 1961. Custody of the children was apparently awarded to the mother following the divorce, but in April, 1972, after further litigation, custody of the children was awarded to the father, Louis. The mother appealed and this court stayed the custody order pending disposition of the appeal. Thereupon,

the children were returned to the custody of the mother and were in her home, with her present husband, Eugene du Fresne, on October 10, 1972, when the incident occurred which triggered this case and its subsequent appeal. (Shortly after the incident in question Mrs. du Fresne dismissed her appeal as to the custody of the children so that the legal custody returned to Louis Sudler.)

On October 10, 1972, John Sudler, the youngest of the Sudler children, then about 12 years old, was punished by his step-father by being beaten with a leather strap for not doing his school homework. The step-father, apparently with the approval of Mrs. du Fresne, also threatened to cut John's hair off, or at least a lock of it. The older boy, David, then summoned his sister, Susan, and they all three began to fight with the step-father. In the course of the melee the step-father was struck with a heavy wooden object which caused his head to bleed and Susan was kicked and pummelled by the step-father. Susan told one of the boys to call the police and he did so. As a result of this fracas the younger children, John and David, after a court hearing, were returned to the custody of the Sudlers but Susan was adjudged to be a neglected minor and was made a ward of the Juvenile Court and placed temporarily at Sunny Ridge Home for Children.

At a subsequent hearing the wardship of Susan was continued. On oral motion of the State's Attorney to assess the costs of care and shelter against the parents, the father, Louis Sudler, moved that such costs of care and shelter, as well as attorney's fees for the attorney appointed to represent Susan, be assessed against the mother, Jane du Fresne, contending that he was not responsible for the fracas which initiated the court proceeding. The du Fresnes were in the process of selling the house awarded to Jane du Fresne in the Sudler v. Sudler divorce settlement and Louis Sudler moved the court to sequester a

sufficient amount from the proceeds of the sale of the house to pay said expenses. The court subsequently ordered that the amount of \$3977 be sequestered from the funds of Jane du Fresne arising out of the sale of said house, pending the further order of the court.

Following this the respective attorneys for Louis Sudler and the du Fresnes entered into negotiations for the purpose of allocating these costs. Pursuant to an agreement between them an order was entered by the court requiring the payment of \$3977, already deposited in escrow with the Chicago Title & Trust Co. by du Fresnes, to the County and to the court appointed attorney, as previously approved. The balance of the expenses in the amount of \$385 was to be assumed by Louis Sudler, as well as the obligation to support and pay for the college education of the children thereafter.

This order is the basis of the appeal in this case. It is contended by the appellants that the order disposing of the proceeds should be vacated (a) because proper notice was not given to the du Fresnes of the motion to assess costs or the motion to sequester the funds; (b) because the du Fresnes were induced to agree to the substance of the order because of a misrepresentation by Louis Sudler that he had no funds to contribute, when actually he had adequate funds; and (c) the order sequestered funds belonging to Eugene du Fresne, who had a half interest in the proceeds of the house sale, thus making the order void as to half of the proceeds since Eugene du Fresne had no obligation as a step-father to contribute to the costs.

After carefully reviewing the record we are of the opinion that the question of notice of the motions was waived by Eugene du Fresne's attorney when he entered into negotiations with the Sudlers' attorney regarding the allocation of the costs. The record clearly indicates that the attorney appeared on behalf of Eugene as well as Jane du Fresne, when he entered his appearance, and his subsequent negotiations as to the form and content of the order allocating the costs and disposing

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of the escrow fund, preclude any objection to the order in question on the ground of proper notice.

As to the contention that the du Fresnes were deceived when Louis Sudler contended he was without funds to pay the costs in question, it is unlikely they were deceived as they claim. Mrs. du Fresne knew her former husband's background very well and knew that he came from a wealthy family. It is more likely that they decided to settle because the sequestering of the funds had put a cloud on the title to the house and was delaying the completion of the sale. Whatever the reason for the agreement, however, they did enter into a stipulated arrangement through their attorney and they are bound by it. In any event the court, after hearing arguments on the point, did not believe that the du Fresnes had been deceived, nor apparently did ^{the court} / feel imposed upon by any alleged misrepresentation made by Louis Sudler during the negotiations. We cannot substitute our judgment for the court's as to whether or not a fraud was practiced on the court.

The final contention with regard to the order complained of is that it attaches funds not responsive to the debt in question, since the amount sequestered represents a joint fund and the court was without power to sequester Eugene du Fresne's half of the fund. He argues that, as a step-father, he had no statutory liability for the costs incurred as a result of the Juvenile Court's orders and dispositions on behalf of the minors.

We believe this argument is based on a misconception as to the nature of the fund in question. While it was undoubtedly true that the house which was sold was in joint tenancy between Eugene and Jane du Fresne at the time of the sale, this did not automatically constitute the fund deposited as a result of the court's order a joint fund. The obligation was Jane du Fresne's, the court's order was directed to her obligation as a parent, and whether the other joint tenant did or did not protect himself against dilution of the funds

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so deposited, the character of the fund remained the same: a security for the payment of the debt agreed to by both parties and disposed of accordingly in the court's order. The fund, thus, was not joint property. It was deposited for a specific purpose--to pay off Jane du Fresne's obligation--and the previous condition of the title to the real estate has no bearing on the court's order or the ownership of the fund.

Lastly, the appellants contend there was not sufficient evidence to have found the minor to be a neglected minor. A neglected minor is defined under the Juvenile Court Act (Ill. Rev. Stat. 1973, ch. 37, par. 702-4, §2-4(1)(b)) as:

"(1) Those who are neglected include any minor under 18 years of age

(b) whose environment is injurious to his welfare or whose behavior is injurious to his own welfare or that of others."

The finding of the court that Susan Sudler was a neglected minor (she was then just under 17) was based on the incident which triggered the petition to make her a ward of the court, the fact that her mother admitted that the girl was beyond her control, and a rather exhaustive psychological report which indicated that Susan was rebellious, disoriented and acting out sexually. According to the report Susan also admitted taking some drugs from time to time. Susan herself admitted the need for the court's supervision and was fully agreeable to being made a ward of the court. Considering this evidence we cannot say that the court's finding that Susan was a neglected minor was not justified. The cases cited by the appellants on this point are not applicable here. In re Interest of Nyce, 131 Ill. App. 2d 481, was a case involving the custody of an infant and the jurisdictional facts were clearly lacking on which to deprive the mother of custody and there was evidence of personal prejudice

based on a limited contact with the mother. The case of In re Dependency of Bartha, 107 Ill. App. 2d 214, (a decision of this court), was decided on the basis of clearly inadequate evidence which was conflicting and the findings were made without proper consideration of all the relevant facts. Neither of these cases resemble the case before us.

The judgment is affirmed.

Judgment affirmed.

THOMAS J. MORAN and DIXON, JJ., concur.



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